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Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 6

EDWARD L. FOGARTY, AS TRUSTEE IN BANK-
RUPTCY OF THE INLAND WATERWAYS, INC.,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA AND NAVY
DEPARTMENT—WAR CONTRACTS RELIEF
BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 20, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

United States Court of Appeals
EIGHTH CIRCUIT

No. 13,857

CIVIL

EDWARD L. FOGARTY, AS TRUSTEE IN BANK-
RUPTCY OF THE INLAND WATERWAYS, INC.,
A CORPORATION, APPELLANT,

vs.

UNITED STATES OF AMERICA AND NAVY
DEPARTMENT—WAR CONTRACTS RELIEF
BOARD, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

FILED MARCH 19, 1949.

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Pleas and proceedings in the United States Court of Appeals for the Eighth Circuit, at the May Term, 1949, of said Court before the Honorable Archibald K. Gardner, Chief Judge, and the Honorable Seth Thomas and the Honorable Walter G. Riddick, Circuit Judges.

Attest:

(Seal)

E. E. KOCH,
Clerk of the United States
Court of Appeals for the
Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the 19th day of March, A. D. 1949, a transcript of record pursuant to an appeal taken from the United States District Court for the District of Minnesota, was filed in the office of the Clerk of the United States Court of Appeals for the Eighth Circuit, in a certain cause wherein Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, was Appellant, and United States of America and Navy Department-War Contracts Relief Board, were Appellees.

Printed record on which the appeal was heard in the United States Court of Appeals for the Eighth Circuit is in the words and figures following, to-wit:

[fol. 1] In The District Court Of The United States
For The District Of Minnesota
Fifth Division

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, Petitioner,

vs.

United States Of America and Navy Department—War Contract Relief Board, Respondents.

On Appeal from the War Contracts Relief Board.

Complaint And Petition Re: Appeal From War Contracts Relief Board Navy Department.

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation by Rollo N. Chaffee and Blum & Jacobson, his attorneys, respectfully represents unto this Honorable court as follows:

1. That this is a petition seeking a determination by this court of the equities involved in the claim of the plaintiff against the United States of America and United States Navy Bureau of Supplies and Accounts pursuant to an Act passed by the 79th Congress being Public Law #657 and entitled "An act to authorize relief in certain cases where work, supplies or services have been furnished for the Government under contract during the war".

2. That the complaint is filed pursuant to the provisions of said Act aforesaid providing for the right of the claimant to petition any Federal Court of competent jurisdiction for relief if such claimant is dissatisfied with the action of the Department.

3. That this court is a proper Federal Court of competent jurisdiction and has jurisdiction of the parties hereto and the subject matter hereof.

4. That the claim of the plaintiff herein was forwarded to the United States Navy Bureau of Supplies and Accounts on to-wit: the 1st day of February, 1947 and the receipt of said claim was duly acknowledged. That a true and correct copy of said claim or of the original claim so filed, will be produced as the time of the hearing herein.

[fol. 2] 5. That the total loss sustained by the claimant and as set forth in said claim aforesaid and filed with the United States Navy Bureau of Supplies and Accounts is in the sum of \$328,804.42; that the said loss was sustained by virtue of the following contracts of the Inland Waterways, Inc. with governmental agencies as follows:

A. Contract #Nos 91957 was entered into on September 18, 1941 with the Navy Department, Bureau of Supplies and Accounts for the sum of \$275,450.00. It cost the Inland Waterways, Inc. \$418,284.61 to perform said contract. It obtained from the Government \$228,118.33 in addition to which the Government received a cash discount of \$191.30, making a total credit of \$228,309.63. The net loss claimed on this contract is \$189,974.93.

B. Contract [Nobs] 147 was entered into on April 16, 1942 with the Navy Department, Bureau of Supplies and Accounts. The contract price was \$232,068.00. It cost Inland Waterways, Inc. \$330,211.65 to perform the contract. It obtained from the Government \$222,118.80. The loss claimed on this contract is \$102,093.65.

C. Contract #NXs 3309 was entered into on April 20, 1942. The contract price was \$52,695.00. It cost Inland Waterways, Inc. \$74,752.67 to process said contract. The claimant obtained \$47,425.60 from the Government to apply on said contract. The net loss claimed thereon is \$27,327.07.

D. Contract #NXss 3309 was entered into on June 30, 1942 with the Navy Department, Bureau of Ships for the sum of \$100,500.00 and supplemented by Contract #NXsss 3309 on October 30, 1942 which was for the sum of \$100,500.00. The cost of production of both of these contract until the date of cancellation was \$45,380.95. The claimant obtained \$35,972.18 from the Government to apply on said contracts. The net loss claimed thereon is \$9,408.77.

6. That on or about on to-wit: the 3rd day of July, 1947 the Navy Department, War Contract Relief Board made a final determination of the claim filed by the complainant herein wherein and whereby the said claim aforesaid was disallowed and refused; the said determination being predicated solely upon the fact that the settlement of all claims arising out of the contracts in question was the subject matter of a release between the Government and the claimant which constituted final action on the requests for relief made, within the meaning of Public Law #657 and [fol. 3] Section 204 of Executive Order #9786 as more fully appears in the determination of the War Contract Relief Board hereto attached and made a part hereof as Exhibit A.

7. That Section 204 of Executive Order #9786 hereinabove referred to provides: "No claim for loss under any contract or sub-contract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date." (Underlining ours)

8. That it is clear, from a reading of the "Final Determination" hereto attached and marked Exhibit A, that the decision of the Board was predicated solely upon the underlined portion of Section 204 of Executive Order #9786.

9. That the claim filed with the United States Navy Bureau of Supplies and Accounts was filed pursuant to the Act passed by the 79th Congress being Public Law #657 and which provides in part under Section 2A thereof: ". . . . and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app. sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act."

10. That Section 3A of the Act provides: ". . . . but a previous settlement under the First War Powers Act, 1941,

or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act."

11. That the claim of the plaintiff herein, therefore, was not determined on its merits and that the relief to which the plaintiff is entitled was denied solely and only upon a misconception of the rights of the plaintiff as set forth in the Act of Congress hereinabove referred to, by the act of the Board in following an Executive Order which is in direct conflict with the provisions and expressed language of the Act itself.

Wherefore your petitioner prays that this Honorable court determine the equities involved in the claim of the plaintiff and determine the amount due to the plaintiff herein pursuant to the claim heretofore filed as hereinabove set [fol. 4] forth and to enter an order directing the War Contracts Relief Board Navy Department to settle the claim of the plaintiff herein in accordance with the findings of this court.

EDWARD L. FOGARTY,
As Trustee in Bankruptcy of the
Inland Waterways, Inc., a Cor-
poration.

ROLLO N. CHAFFEE,
BLUM & JACOBSON,
Attorneys for Plaintiff.

By Rollo N. Chaffee,
First National Bank Building,
Duluth, Minnesota.

State Of Minnesota,
County Of St. Louis—ss.:

Edward L. Fogarty, being first duly sworn upon his oath deposes and says that he is the duly elected and qualified Trustee of Inland Waterways, Inc., a corporation; that he has read the above and foregoing Complaint by him subscribed and knows the contents thereof and that the same is true.

EDWARD L. FOGARTY

Subscribed And Sworn to before me this 1st day of December, 1947.

(Seal)

ROLLO N. CHAFFEE,

Notary Public,
St. Louis County, Minn.

My Commission expires May 25, 1949.

[fol. 5]

Exhibit "A".

Navy Department

War Contracts Relief Board

In the Matter of the Claim of

Inland Waterways, Inc.

Final Determination.

The claim of Inland Waterways, Inc., having been filed with the Navy Department on or before the 7th day of February, 1947, under the provisions of Public Law 657, 79th Congress, 2nd Session and Executive Order No. 9786 issued pursuant to the provisions thereof on the 5th day of October, 1946; having been verified to the extent deemed necessary; having been submitted to the Navy Department War Contracts Relief Board set up in the Navy Department as the central agency to receive, consider, settle and adjust such claims as required by said Executive order; and the Board having received such claim under the rules promulgated by the Board pursuant to the authority of said Executive order and of the Secretary of the Navy, Now Then,

The Navy Department War Contracts Relief Board hereby makes and files the following Findings of Fact and Determination with respect to such claim:

Findings Of Fact

1. The claim of Inland Waterways, Inc., is a claim for losses alleged to have been incurred in the performance of Contracts NOs-91957, NObs-147 and NXs-3309 with the Navy Department, covering the construction of submarine chasers and planes rearming boats.

2. Prior to the 20th day of February, 1945 claimant submitted invoices to the Bureau of Supplies and Accounts and the Bureau of Ships for sums in addition to the stated contract prices of the contracts involved in this claim. These invoices purported to bill the Navy Department for losses alleged to have been occasioned by reason of changes in specifications and interference by officers and agents of the Government with production under the contracts.

3. On the 18th day of December, 1942 claimant filed a petition in the Federal District Court for the District of Minnesota for reorganization under the provisions of Chapter X of the Acts of Congress relating to bankruptcy and a Trustee in bankruptcy was duly appointed in such proceedings.

4. Thereafter, on the 20th day of February, 1945, pursuant to negotiations looking to the settlement of contractor's claims, the Trustee in bankruptcy and the Government, represented by the Navy Department contracting officers involved, entered into a final settlement agreement covering Contracts NOS-91957, NObs-147 and NXs 3309. Article 3 of the final settlement agreement covering all three of the contracts involved reads as follows:

Exhibit A.

"Article 3. Release—The Trustee, for himself, in his capacity as Trustee, for his successors and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agents and employees and the Government remises, releases and forever discharges the Trustee and his successors and the Contractor, its successors and assigns of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions."

5. No request for relief, written or otherwise, except to the extent that the invoices filed might be so considered, were filed by or on behalf of claimant on or before August 14, 1945.

[fol. 6]

Determination.

1. Claimant relies solely upon the invoices submitted prior to February 20, 1945 as satisfying the requirements of Public Law 657, 79th Congress, 2nd Session and Executive Order No. 9786, that written requests for relief with respect to claimed losses must have been made prior to 14 August 1945. It is, however, unnecessary to decide whether or not the invoices filed constituted written requests for relief with respect to the losses claimed, as, if the invoices are treated as written requests, then the settlement of all claims in law and in equity arising under the contracts in question agreed to on the 20th day of February, 1945 and the mutual release made a part thereof, constituted final action on the requests made within the meaning of Public Law 657 and Section 204 of Executive Order No. 9786. The War Contracts Relief Board is therefore without authority to consider the claim and denies the same.

2. Let the Recorder of the Board notify claimant of this decision by forwarding a copy hereof to Counsel for the claimant by registered mail.

Dated at Washington, D. C. this 3rd day of July, 1947.

/s/ JAS. D. BOYLE,
James D. Boyle, Rear Admiral, SC, USN
(Ret. Chairman.)

/s/ MARCY M. DUPRE, JR.,
Marcy M. Dupre, Jr., Captain USN
Member.

/s/ WILLIAM L. EAGLETON,
William L. Eagleton, Captain, USNR
Member.

Certified a true copy.
DAVID L. HAKE,
Commander, USNR
Recorder.

Endorsed: Filed In U. S. District Court On December
1, 1947.

[fol. 8] Notice Of Motion And Motion To Dismiss
Petitioner's Claim And For Summary Judgment.

To Rollo N. Chaffee, and
Blum & Jacobson,
Attorneys for Petitioner,
First National Bank Bldg.,
Duluth, Minnesota.

Please Take Notice that the Respondents will move the Court at the place designated for the holding of Court in the United States Postoffice Building, City of Duluth, Minnesota, on the 5th day of March, 1948, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order of this Court to dismiss the claims of the Petitioner herein, and for summary judgment in favor of Respondents, on the following grounds:

- (1) That the Complaint and Petition herein fail to allege that Petitioner filed a written request for the relief, with the Navy Board on or before August 14, 1945, as required by Section 3 of the so-called Lucas Act, Public Law No. 657, 79th Congress, Second Session.
- (2) That on February 20, 1945, a final and complete settlement of claims stated in the Petitioner's Complaint and Petition, was entered into for a valuable consideration, between the Petitioner and the Respondents, a certified copy of which is hereto attached and made a part hereof, and the said agreement constituted "final action" within the meaning of Paragraph 204 of Executive Order 9786 [fol. 9] (11 F. R. 11533), by reason of which Petitioner is barred from prosecuting the claims set forth in his Complaint and Petition, in this proceeding.
- (3) That independent of Paragraph 204 of said Executive Order No. 9786, the Petitioner's claim or claims, are completely barred by reason of said settlement of February 20, 1945.

* Respondent's said Motion will be based upon the Petitioner's Complaint and Petition herein, and upon this Mo-

tion and the said Agreement of February 20, 1945, attached to this Motion.

Dated: February 3rd, A. D. 1948.

VICTOR E. ANDERSON,
United States Attorney.

JAMES J. GIBLIN,
Assistant United States Attorney.

221 Federal Courts Building,
St. Paul (2), Minnesota,
Attorneys for Respondents.

Due and personal service of the within Notice of Motion is hereby admitted this 4 day of February, 1948.

ROLLO N. CHAFFEE,
BLUM & JACOBSON,
Attorneys for Petitioner,
First National Bank Building,
Duluth, Minnesota.

[fol. 10]

Supplemental Contract.
For

Final Settlement Of Contracts NOS. 91957,
NOS-147, NXs-3309 And Supplements Thereto
And Certain Outstanding Notes Issued By
Inland Waterways, Inc.

Witnesseth:

Whereas, the United States of America (hereinafter called the "Government") and Inland Waterways, Inc., a corporation organized and existing under the laws of the State of Minnesota, whose address is 1000 Minnesota Avenue, Duluth, Minnesota, (hereinafter called the "Contractor") entered into a contract designated NOS-91957, dated 18 September 1941, for the construction of two (2) Submarine Chasers, PC670 and PC671, at a fixed price of one hundred thirty-seven thousand six hundred ninety dollars (\$137,690) per vessel, subject to adjustment as provided in said contract; and

Whereas, the Government and the Contractor entered into a contract designated NObs-147, dated 6 April 1942, for the construction of two (2) additional Submarine Chasers, PC1059 and PC1060, at a fixed price of one hundred thirty-nine thousand eight hundred dollars (\$139,800) per vessel, subject to adjustment as provided in said contract; and

Whereas, the Government and the Contractor entered into a contract, designated NXs-3309, dated 20 April 1942, for the construction of ten (10) 33-ft. Plane Rearming Boats at a fixed price of five thousand three hundred dollars (\$5,300) per boat, subject to adjustment as provided in said contract; and

Whereas, the Government and the Contractor, by supplemental agreements dated, respectively, 30 June 1942 and 30 October 1942, extended said Contract NXs-3309 to provide for the construction of forty-(40) additional Plane Rearming Boats at a fixed price of five thousand twenty-five dollars (\$5,025) per boat, subject to adjustment as provided in said contract; and

Whereas, the Government, acting through the Federal Reserve Bank of Minneapolis as fiscal agent of the Government, and the First & American National Bank of Duluth entered into a V-loan agreement, designated NOfi-5, dated 23 May 1942, (hereinafter called the "guarantee agreement"), whereby the Government guaranteed one hundred percent (100%) of a loan in the maximum amount of one hundred thousand dollars (\$100,000) made by said First & American National Bank to the Contractor (hereinafter called the "guarantee loan"); and

Whereas, by agreement dated 1 October 1942, the Government and the Contractor supplemented said Contract NXs-[fol. 11]-3309 to provide for an advance payment in the amount of twenty-five thousand dollars (\$25,000), bearing interest at the rate of two and one-half percent (2-½%) per annum, to be liquidated by withholdings from progress payments under said contract; and

Whereas, no part of such advance payment has been liquidated; and

Whereas, the Government and the Contractor, by amendment dated 3 October 1942, supplemented said Contract

NObs-147 to provide for an advance payment of fifty-five thousand dollars (\$55,900), bearing interest at the rate of two and one-half percent (2½%) per annum, to be liquidated by withholdings from progress payments under said contract; and

Whereas, the unliquidated principal amount of such advance payment is twenty-nine thousand nine hundred thirty-seven dollars and one cent (\$29,937.01); and

Whereas, the Contractor delivered Submarine Chasers PC670 and PC671 to the Government with certain defects and deficiencies therein for which the Contractor is responsible under the contract therefor; and

Whereas, the Contractor delivered the first ten (10) Plane Rearming Boats to the Government substantially in accordance with the terms of the contract therefor; and

Whereas, Submarine Chasers PC1059 and PC1060 were not completed by the Contractor on or before the date specified in Contract NObs-147 for delivery of said vessels but were delivered to the Government subsequent to said date with much uncompleted and defective work which was completed and corrected at the expense of the Government; and

Whereas, on 17 December 1942, the Government, pursuant to Section 7 of the guaranteed agreement, purchased the outstanding principal of the guaranteed loan in the amount of forty-three thousand twenty-four dollars and forty-two cents (\$43,024.42), together with accrued interest in the amount of one hundred dollars and twenty cents (\$100.20); and

Whereas, on or about 18 December 1942, the Contractor filed a petition in the District Court of the United States for the District of Minnesota, Fifth Division (hereinafter called the "Court") for reorganization under chapter X of the Acts of Congress relating to Bankruptcy; and

Whereas, by order dated 19 December 1942, the Court granted said petition and appointed Nelson J. Spencer, Vice President of the Contractor, and Edward L. Fogarty (hereinafter called the "Trustees") Trustees to take charge of the property and affairs of the Contractor; and

Whereas, little or no productive work was thereafter performed by, the Trustees in the performance of Contract NXs-3309; and

Whereas, by Order dated 9 January 1943, the Court accepted the resignation of Nelson J. Spenceer as additional trustee and ordered that Edward L. Fogarty (hereinafter called the "Trustee") be continued in charge of the Contractor and its affairs; and

Whereas, the Government, on 19 March 1943, requisitioned the Plane Rearming Boats which were partially completed by the Contractor prior to the cessation of its [fol. 12] operations under Contract NXs-3309 and the material and equipment acquired by the Contractor for the construction thereof; and

Whereas, at the time of delivery of said requisitioned property to the Government, certain amounts, including the unpaid balance of the guaranteed loan and accrued interest thereon, the unliquidated principal and accrued interest on the advance payments, the cost of completing incomplete and defective work on Submarine Chasers PC670, PC671, PC1059, and PC1060, and the decreased cost resulting from certain changes in the approved plans and specifications, were due to the Government from the Contractor and certain amounts, including payments for progress in construction, overtime work, changes in the plans and specifications involving increased cost to the Contractor, fuel and lubricating oil left on board Submarine Chasers PC670 and PC671 at the time of delivery thereof, increased costs resulting from increased wage rates established by the Zone Wage Stabilization Standard and amendments thereof applicable to the Contractor's plant, the value of the requisitioned property and the cost of preservation thereof, were due to the Contractor from the Government; and

Whereas, many of said amounts were unliquidated and therefore the net balance with respect to each contract and the net balance with respect to all transactions between the Government and the Contractor and the Government and the Trustee were not known to the Government or to the Trustee; and

Whereas, the Government on 5 May 1943 filed certain claims against the Contractor in the proceedings for its reorganization and the Trustee on 31 July 1943 filed certain counterclaims against the Government in said reorganization proceedings; and

Whereas, subsequent to the filing of the Government's claims against the Contractor and the Trustee's counter-claims against the Government, representatives of the Government and the Trustee tentatively agreed upon certain amounts in liquidation of all claims of the Trustee against the Government,

Now, Therefore, in consideration of the premises, the parties hereto do mutually agree as follows:

Article 1. Scope.—(a) The Government shall pay the Trustee in full satisfaction, payment and discharge of all amounts due from the Government to the Trustee in excess of all amounts due from the Trustee to the Government under or as a result of Contract NOs-91957 the sum of fifty-eight thousand six hundred twenty-nine dollars and eighteen cents (\$58,629.18).

(b) The Government shall pay the Trustee in full satisfaction, payment and discharge of all amounts due from the Government to the Trustee in excess of all amounts due from the Trustee to the Government under or as a result of Contract NXs-3309, and the supplements thereto, the sum of twenty-two thousand eight hundred eighty dollars and twenty cents (\$22,880.20), less interest accrued on the unliquidated advance payment thereunder.

(c) The Trustee shall pay the Government in full satisfaction, payment and discharge of all amounts due from the Trustee to the Government in excess of all amounts due from the Government to the Trustee under or as a result of Contract NObs-147 the sum of twenty-two thousand one hundred eighty dollars and two cents (\$22,180.02), plus interest accrued on the unliquidated advance thereunder.

[fol. 13] (d) The trustee shall pay the Government the sum of forty-two thousand eight hundred fifty-four dollars and nine cents (\$42,854.09), plus interest accrued on said notes, in full satisfaction, payment and discharge of all amounts

due from the Trustee to the Government under the notes issued by the Contractor pursuant to the guaranteed loan and purchased by the Government in the manner hereinabove set forth.

Article 2. Payment.—The amounts due from the Government to the Trustee under paragraphs (a) and (b) of Article 1 shall be set off against the amounts due from the Trustee to the Government under paragraphs (c) and (d) of Article 1, and the Government shall, upon submission of invoices therefor by the Trustee in such form and detail as the Bureau of Supplies and Accounts of the Navy Department may prescribe or approve, make payment to the Trustee of the balance so remaining payable to the Trustee.

Article 3. Release.—The Trustee, for himself, in his capacity as Trustee, for his successors and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agents and employees and the Government remises, releases and forever discharges the Trustee and his successors and the Contractor, its successors and assigns of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions.

In Witness Whereof, this supplemental contract has been duly executed on the respective dates set forth below.

Date

EDWARD L. FOGARTY,
Trustee Of Inland Waterways,
Inc. In Reorganization Under
Chapter X Of The Acts Of Con-
gress Relating To Bankruptcy.

February 13th, 1945

By /s/ EDWARD L. FOGARTY.
THE UNITED STATES OF
AMERICA,

17 February, 1945

By F. J. WILLE,
Contracting Officer, Bureau of
Ships, Navy Department.

17 February, 1945

By /s/ DONALD P. WELLES,
Chief of Finance Division,
Office of Procurement and Ma-
terial, Navy Department.

20 February, 1945

By /s/ HOWARD D. FULLMER,
Purchasing Officer, Bureau of
Supplies and Accounts, Navy
Department.

[fol. 14] United States of America
District of Minnesota.—ss:

I, Thomas H. Howard certify that I am the Clerk of the United States District Court in and for the District of Minnesota; that Edward L. Fogarty who signed this release as Trustee of Inland Waterways, Inc., was then Trustee of said corporation pursuant to the order of said Court; and that this release was duly signed by said Trustee by authority of said Court as shown by the annexed certified copy of the original authorizing Order now remaining among the records of said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Duluth, Minesota, this 13th day of February, A. D., 1945.

s/ THOMAS H. HOWARD
Clerk.

by s/ E. Catherine Neff
Deputy.

State of Minnesota,
County of St. Louis.—ss:

On this 13th day of February, 1945, before me personally appeared Edward L. Fogarty, known to me and known by me to be the person who executed the above instrument, who, being by me first duly sworn, did depose and say that he is Trustee for Inland Waterways, Inc.; and that he executed the said instrument for the uses and purposes mentioned therein.

s/ H. G. GEARHART
Notary Public in and for the
County of St. Louis,
State of Minnesota.

My Commission expires February 17, 1947
(Notarial Seal)

Certified to be a true copy

M. A. Rooney /s/

Endorsed: Filed in U. S. District Court on February 11, 1948.

[fol. 18] (Order granting Respondent's Motion for Summary Judgment.)

In the District Court of the United States for the District of Minnesota, Fifth Division

Edward L. Fogarty, as Trustee in Bankruptcy in the Inland Waterways, Inc., a Corporation, Petitioner,
No. 833 vs. Civil

United States of America and Navy Department—War Contracts Relief Board, Respondents.

On Appeal From the War Contracts Relief Board

The Respondents on April 2, 1948, at the Federal Courts Building, St. Paul, Minnesota, presented to the undersigned Judge of this Court a motion to dismiss the above entitled action and for a summary judgment therein.

Honorable Victor E. Anderson, United States Attorney for Minnesota, Mr. James J. Giblin, Assistant United States Attorney, St. Paul, Minnesota, and Mr. Hubert H. Margolies, Attorney of the Department of Justice, Washington, D. C., for the respondents.

Mr. Rollo N. Chaffee of Duluth, Minnesota, and Mr. George M. Shkoler of Messrs. Blum and Jacobson, Chicago, Illinois, for the petitioner.

On the files and records in the case, the briefs and arguments of counsel, and on due consideration,

It Is Ordered, That the respondents' motion for a summary judgment be and it hereby is granted with costs,

The memorandum hereto attached is made a part hereof.

The petitioner is allowed an exception.

By The Court:

ROBERT C. BELL
United States District Judge

St. Paul, Minnesota,
August 28, 1948.

[fol. 19] (Memorandum of United States District Court.)

The petitioner as Trustee in Bankruptcy, prior to VJ-day, had asserted various claims against the Navy Department of the United States on contracts NOs 91957, NObs-147, NXs 3309 and supplements thereto for the construction of submarine chasers and plane rearming boats as contained in invoices submitted to the Department, and the Department had asserted claims against the petitioner. These parties entered into an agreement February 20, 1945, compromising and settling this controversy and the agreement was authorized and approved by this Court. Some of the work furnished by the bankrupt was incomplete and defective and the claims were wholly unliquidated. As stated in the agreement "many of said amounts were unliquidated and therefore the net balance with respect to each contract and the net balance with respect to all transactions between the Government and the Contractor and the Government and the Trustee were not known to the Government or to the Trustee." However, it was agreed that the Department should pay petitioner approximately sixteen thousand dollars. The petitioner received payment. The agreement provided:

[fol. 20] "The Trustee, for himself, in his capacity as trustee, for his successors, and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agent and employees . . . of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions."

The petitioner in February, 1947, filed his claim for relief with the Navy Department under the Act of August 7, 1946, 41 U. S. C. 106 note, 60 stat. 902. This claim was

denied by the Navy Department War Contract Relief Board on July 3, 1947, on the ground that the settlement agreement on February 20, 1945, constituted final action within the meaning of paragraph 204 of Executive Order 9786 (11 F. R. 11553) providing that "no claim shall be considered if the final action with respect thereto was taken on or before" August 14, 1945, regardless of whether the invoices were written requests for relief with respect to losses. This action then was commenced for \$328,804.42 on December 1, 1947, under the Act of August 7, 1946.

The respondents moved to dismiss the complaint and for summary judgment on the grounds that the petitioner had not filed a written request for relief from losses with the Navy Department by August 14, 1945, as required by Section 3 of said act; that the settlement agreement between the petitioner and the Navy Department constituted final action within the purview of paragraph 204 of Executive Order 9786 and notwithstanding paragraph 204 the agreement of February 20, 1945, barred relief. The motion to dismiss in effect was withdrawn. Consequently, the motion for a summary judgment will be given consideration herein.

Respondents also objected that suit could not be maintained against the United States (See United States vs. Sherwood, 312 U. S. 584) and that the complaint was jurisdictionally defective and subject to motion to dismiss for failing to include in the complaint the allegation that the plaintiff had filed a written request for relief from losses with the Navy Department by August 14, 1945. These objections in effect were waived by respondents at the hearing. Such defects in the complaint, of course, might have been cured by amendment. It is unnecessary to pass on [fol. 21] these contentions of the respondents since the motion for summary judgment in the opinion of this Court must be sustained on other grounds.

The Court now is concerned with issues as follows: (1) Whether petitioner's claim under the Act of August 7, 1946, submitted to the Court on April 2, 1948, discloses any written request for relief from losses filed with the Navy Department by August 14, 1945; (2) The validity of paragraph 204 of Executive Order 9786; and (3) Whether the

agreement of February 20, 1945, bars the maintenance of this suit.

I. Was a request for relief filed?

Section 3 of the Act of August 7, 1946, provides "Claims for losses shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945."

Congress under the Act of August 7, 1946, intended to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945. The copies of alleged requests for relief from losses submitted by the petitioner as a part of his claim under the Act of August 7, 1946, in compliance with paragraph 202 (e) of Executive Order 9786 were merely invoices that had been submitted to two Navy bureaus (The Bureau of Supplies and Accounts and the Bureau of Ships) for sums in addition to the stated contract prices for the contracts involved in the claim; that is, for extras under the contract, and a claim for allegedly requisitioned property. The invoices contained nothing to identify them as Requests for relief from losses and as application for First War Powers Act relief rather than for extras under the contract. Obviously a contractor may present claims for extras without representing either that he sustained a loss or that he seeks relief from a loss. The word "losses" was conspicuously missing. The documents now relied on by petitioner were invoices for money claimed under the contracts. They are not written requests for relief from losses within the meaning of the act. As for the petition, Requisition Navy 120, dated July 23, 1943, on [fol. 22] which petitioner relies, it is not a claim for losses in the performance of a contract for furnishing work, supplies or services to a war agency (Act of August 7, 1946, Section 1) but is a claim to compensation for requisitioned property in the absence of a contract and demands \$35,466.00 as the fair and reasonable value, and \$6,125.39 for the care and conservation of property.

It is not sufficient that a request for some sort of relief was filed. A request for relief from a loss must definitely be a request for an amendment to a contract without consideration under the First War Powers Act. The absence

from the claim filed under the Act of August 7, 1946, of any request for relief from losses bars relief. United States ex rel. Tungsten Reef Mines Co. vs. Ickes, 84 F. 2d 257 (Appeals D. C.); Crimora Managanese Corporation et al. vs. Wilbur, 47 F. 2d 417, 421 (Appeal D. C.) cer. d. 283 U. S. 861; Marshall vs. Wilbur, 47 F. 2d 421, 422, cer. d. 283 U. S. 861. On May 25, 1948, in Jardine Mining Co. vs. R. F. C., District Court of the United States for the District of Columbia, Civil Number 2843-47, Justice Letts entered summary judgment in favor of defendant in a suit under the Act of August 7, 1946, for the reason, inter alia, that plaintiff had failed to file a written request for a relief from losses as required by Section 3 of the Act, since claims for relief under the contract were not requests for relief from losses as required by Section 3 of the Act, since claims for relief under the contract were not requests for relief from losses under the First War Powers Act and the plaintiff neither adverted to any specific losses nor requested First War Powers Act relief. In the case at bar a request for a relief was not filed as required by Section 3 of the Act of August 7, 1946, and paragraph 204 of Executive Order 9786.

II. Validity of Paragraph 204 Executive Order 9786.

The petitioner has attacked the validity of the President's regulations (Executive Order 9786) and particularly [fol. 23] paragraph 204 thereof. If this paragraph is valid, it is imperative that the motion for summary judgment must be granted. It is proper here to observe that the view of Justice Letts, United States District Court for the District of Columbia, in his order of May 25, 1948, in Jardine Mining Company vs. R. F. C. (unreported) is more acceptable than the opinion of Justice Holtzoff, United States District Court for the District of Columbia, of June 25, 1948, in Warner Construction Company vs. Krug and the United States. (also unreported).

The Act of August 7, 1946, was intended for the benefit of contractors who had filed claims for relief under the First War Powers Act prior to VJ-day which had not been acted on before that date, and which were not considered after VJ-day because of the War Department's interpretation that the power to grant relief under the First War

Powers Act had lapsed as it then was unable to find that allowance would facilitate the prosecution of the war. In other words, the war had ended. Claimants filing before VJ-day who were unable to secure action on their claims solely because of delay in processing were thought to be in an inequitable position as compared to claimants who had succeeded in obtaining a ruling by VJ-day. The act had the limited objective of repairing the injustice whereby some claims might not have been considered on their merits. It was an equalization device. Those whose claims had already been considered were not the objects of Congressional solicitude; their position was not to be improved but was to constitute the yardstick by which the equity of claims which had not been processed by VJ-day might be appraised.

Obviously the subject matter of the act was gratuity legislation, *Work vs. Rives*, 267 U. S. 175; *Nelson vs. Ickes*, 113 F. 2d 515 (Appeal D. C.); *Ickes vs. Cuyuna Mining & Investment Co.*, 69 F. 2d 662 (Appeal D. C.) *cert. d.* 293 & S. 562; *Grover vs. Merritt Development Company*, 47 F. Supp. 309 (D. C. Minn.). To effectuate its objectives a large measure of discretion was vested in the President who was specifically authorized in Section I to issue his regulations within sixty days from the approval of the act. In compliance with this authorization the President promulgated Executive Order 9786. In the light of the nature of the legislation and its history, the regulations are in con-[fol. 24] formity with the purpose of the act and do not conflict with it; to the contrary they affirmatively make it workable. *United States vs. Antikamnia Chemical Co.*, 231 U. S. 654.

The legislative intent is revealed by the committee reports (S. Rept. 1669, 79th Cong., 2nd Session; H. Rept. 2576, 79th Cong., 2nd Session) accompanying S. 1477, 79th Congress, which became the Act of August 7, 1946. The purpose is explained as follows:

"This bill, as amended, would afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claims would have received favorable consideration under the First War

Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government. However, upon the capitulation, the "position was taken by certain departments and agencies of the Government involved, that no relief should be granted under the authority which then existed, unless the action was required in order to insure continued production necessary to meet post VJ-day requirements. This was on the basis that the First War Powers Act was enacted to aid in the successful prosecution of the war and not as an aid to the contractors. As a result, a number of claims which were in process at the time of the surrender of the Japanese Government or which had not been presented prior to such time, were denied even though the facts in a particular case would have been justified favorable action if such action has been taken prior to surrender." (Underscoring supplied.)

Insistence that the claims would have received favorable action under the First War Powers Act had there been a ruling prior to VJ-day accompanies the entire course of S. 1477 through Congress. This is revealed by the statement of Senator Lucas in introducing S. 1477 on October 11, 1945, 91 Congressional Record 9564; the statements of Senators Lucas and McCarran on the floor July 16, 1946, 92 Congressional Record 9092. At the hearing on S. 1477 before the Senate Subcommittee of the Judiciary at page 17 Senator Lucas testified that the purpose of the bill was "Nothing more or less than an amendment to the original act, which would give the War Department the power to do the very thing which they claim they did not have the power to do". That the act was substantially a continuance [fol. 25] of Section 201 of the First War Powers Act (50 U. S. C. 611) is reinforced by the limitation of relief to agencies authorized to modify contracts under Section 201 and to losses from which request for relief have been filed by VJ-day.

As a continuance of the First War Powers Act, which empowered the President to authorize agencies and departments to modify contracts without consideration, it was only natural that the act of August 7, 1946 should confer broad authority on the President. Delegation of rule mak-

ing power to the President rather than to the heads of departments highlights the extent of the discretion delegated and the essentially legislative character of the power to issue regulations. The bestowal of such authority must be construed to convey a measure of power adequate to the accomplishment of the purpose. *United States vs. George S. Bush & Co.*, 310 U. S. 371; *Commissioner vs. South Texas Lumber Company*, 333 U. S. 496. It was appropriate for the President to include in his regulations a provision denying a relief on any claim where final action had been taken by VJ-day. Under the circumstances the regulations in effect were a part and parcel of the legislation. To exercise them separate and apart from the act eliminates an organic part of it. Without the authority of the President to make such regulations and thus to complete its broad provisions, it is doubtful if the legislation would have been enacted or approved. Nullification of Paragraph 204 removed limitations and controls Congress affixed to this legislation and produces a statute radically different from that intended by the Act of August 7, 1946. In dealing with such legislation the courts will not violate the intention of Congress by a pretense of adhering to the letter of the law. *Central Hanover Bank & Trust Co. vs. Commissioner*, 2 Cir. 159 F. 2d 167. The legislation does not so plainly and unambiguously support petitioner's contention as to preclude resort to appropriate material for ascertaining the legislative intention and the interpretation of the act. The use of materials here to ascertain the legislative intent seems appropriate. *United States vs. American Associations, Inc. et al.*, 310 U. S. 534; *United States vs. Dickerson*, 310 U. S. 554; *Harrison vs. Northern Trust Company*, 317 U. S. 476; *Mitchell vs. Cohen*, 333 U. S. 411.

[fol. 26] Legislative history leaves no doubt as to the meaning of the act nor as to the validity of the regulations; the President's regulations are integrated into the act and limit departmental, agency, and court allowance alike. Even if petitioner had filed a written request for relief from losses, his recovery under the Act of August 7, 1946, Section 6, might not exceed the amount allowable by the department or agency concerned under the terms of the act, including the regulations. The petitioner's contention of invalidity is not supported by the decisions he cites deal-

ing with regulations at variance with the terms of the statute and promulgated by inferior officers. The Act of August 7, 1946, was gratuity legislation, a broad discretion was delegated, and the purposes of the regulations are entirely consistent with the act. The discretion in issuing regulations depends to some extent on the subject matter. *Hamilton vs. Dillon*, 21 Wall. 73. Here the subject matter was open-end legislation relating to a gratuity. *Work vs. Rives*, 267 U. S. 175.

The exception in the terminal clause of Section 3 of the Act of August 7, 1946, "but a previous settlement under the First War Powers Act, 1941, or the Contracts Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this act" obviously refers to unilateral determination. *Illinois Surety Co. vs. United States To The Use of Peeler et al., Trading As Faith Granite Company*, 240 U. S. 214, and excludes bilateral consensual arrangements. Apart from this consideration the exception clause, read in the light of the manifest purpose of the act (to extend the war-powers act for the benefit of contractors whose claims had not been processed by August 14, 1945) encompassed the following situations: (1) where a contract had already been amended under the First War Powers Act, if performance had continued, and a new request for further relief was under advisement on VJ-day, further consideration might be given; (2) where the department had taken final action on only part of a request, it might proceed to dispose of the whole claim; and (3) a contractor with a number of contracts might have his pending requests considered even though final action had been taken under the First War Powers Act or the Contract Settlement Act of 1944 on his other contracts.

[fol. 27] "Further relief otherwise allowable" means consistent with the basic objectives of the act. It does not revive requests which had been disposed of by VJ-day. In the words of the Navy Department War Contracts Relief Board in *United Concrete Form Products Company*, September 29, 1947, C. C. H. Government Contracts Reporter, 4 C. C. F. Par. 60449: "In order for a claim to be otherwise allowable the right to further relief under the First War Powers Act as to certain portions of the claim would

have had to be specifically reserved for further consideration by the terms of the settlement itself, or a new request for relief, upon which final action was not taken before August 14, 1945, would have had to be submitted. The Statute contains no authority for a department or agency of the government to revive a request for relief upon which final action was taken before August 14, 1945. However, had a new and timely second request been submitted, the previous settlement under the First War Powers Act of the first request would not operate to preclude further relief otherwise allowable under the act based on the second request." The agreement of February 20, 1945, was not entered into by the Navy Department under the authority of either the First War Powers Act or the Contract Settlement Act, for no reference to either source of authority is made therein. The practice of government agencies invoking such special statutory authority was to recite formally in the contract that such authority was being exercised. If the First War Powers Act relief had been requested, or had been granted in the agreement of February 20, 1945, the petitioner would be in no stronger position; because at no point in the consideration of S. 1477 was it suggested that contractors who had asserted First War Powers Act claims, and who had been granted relief, might elect to look upon previous compromises as payments on account, and sue under the act for the difference between the maximum estimate of their claims or net losses and the payments they had theretofore accepted as payment in full.

In the Hearings on S. 1477, before a Subcommittee of the Senate Committee on the Judiciary, 79th Congress, 2d Sess., the following colloquy between Senator McCarran, Chairman of the Subcommittee on S. 1477 and J. Henry Neale, General Counsel for the Navy Department, at pp. [fol. 28] 64-65, demonstrates that the Act of August 7, 1946, was not intended to resurrect previously considered claims, but was designed to eliminate VJ-day as a barrier to the consideration of claims pending undisposed of on that day:

"The Chairman. I do not understand that the idea of the bill is to direct payment of something that was turned down on the merits.

"Mr. Neale. I quite understand, Senator.

"The Chairman. I do not think the Congress of the United States will want to inject itself into a judgment on the merits, on the facts. I think the Congress, if it will want to do anything, will want to so clarify the law that as to the just and equitable case that seems to be precluded from judgment by reason of the condition that has arisen, the condition will be removed so that its merits may be considered. I think that is all the Congress will want to do."

In attacking par. 204 of Executive Order, petitioner has patently misread Section 2(a) of the Act as Guaranteeing contractors against losses sustained without fault or negligence, whereas that section plainly fixes a ceiling or maximum on the amount of the relief allowable and is not in any sense a mandate to award the full amount of the losses. Section 2 itself, the title of the act, "An Act to authorize relief in certain cases, where work, supplies or services have been furnished for the Government under contracts during the war", the direction that the court sit as a court of equity to determine the equities of the claim, and the legislative history, prove that no such guarantee against losses was intended or given all war contractors free from fault or negligence. Moreover "a liability in any case is not to be imposed upon a government without clear words . . . and where, as here, the liability would amount to great sums, only the plainest language could warrant a court in taking it to be imposed . . . "Pine Hill Coal Co., Inc. v. United States, 259 U. S. 191, 196; of . United States v. Zazove, 68 S. Ct. 1284, 1291.

III. Effect of settlement agreement.

The Inland Waterways, Inc. had its corporate birth [fol. 29] during the war and was organized for the purpose of obtaining contracts with the government to construct submarine chasers and plane rearming boats. It was financed with government funds. In a comparatively brief period financial difficulties were encountered and a proceeding was commenced under the Bankruptcy Act. A few ships had been built and several were in the course of construction. Much of the work was incomplete and

defective. Labor claims having priority under the law were pressing. Creditors and all parties concerned were desirous of effecting a settlement with the government for the funds claimed due the bankrupt under the contracts.

On February 20, 1945, the date the settlement agreement was executed, the First War Powers Act was in effect. The petitioner presented his claims for money alleged due the contractor at the time. Presumably all claims were presented and considered. If the petitioner had any claims for losses naturally he then would have made them known. In any event a settlement was made and the petitioner, as a trustee in bankruptcy, on behalf of the contractor and with the authority and approval of the court executed an instrument in writing releasing and forever discharging the government *** of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims, and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions". This release was as far reaching and as sweeping in its terms as language could make it. It was executed by parties perfectly capable of contracting, knowing the facts, and dealing at arm's length with each other. It is clear, unambiguous, has not been impeached, rescinded, changed or modified in any respect. The matters now submitted as requests for losses were made integral parts of the settlement agreement. At the time of execution of the settlement contract the First War Powers Act was in effect, but no relief could then have been had under it. The Act of August 7, 1946, conferred no greater rights on the petitioner. The respondents in this case were not bound by any duty, obligation or contract [fol. 30] on which the act could operate, or authorize the petitioner to make a request for losses. Congress was dealing with existing, outstanding, valid claims that had not been paid or settled, situations where claimants might be denied a day in court or a chance to be heard. Congress had no intention of renewing a claim that had been settled and completely terminated by a voluntary act of the parties concerned.

The agreement of February 20, 1945, specifically recites that "many of said amounts were unliquidated and there-

fore the net balance with respect to each contract and the net balance with respect to all transactions between the government and the contractor and the government and the trustee were not known to the government or to the trustee." Thus the agreement compromised unliquidated claims and was not a settlement in the sense of a unilateral administrative determination of the amount due. 31 U. S. C. 71, 72; Illinois Surety Company v. United States, *supra*. The legislative history is barren of any suggestion that a binding and valid compromise, resulting from negotiations of the interested parties supported by a consideration on both sides followed by an exchange of releases may be disregarded by claimants to the gratuity extended to the Act of August 7, 1946. Under Section 6, the court is directed do sit as a court of equity; to regard petitioner as still having requests for relief from losses outstanding on VJ-day and require a determination by the court, despite the absoluteness of the terms the agreement, that it was tentative, and inconclusive as to the petitioner, but final and conclusive as to the United States does not accord with principles of equity. The formality and conclusiveness of a settlement by agreement are essential presuppositions of the Contract Settlement Act, 41 U. S. C. 106 (c) and (e) and Executive Order 9786 paragraphs 308 and 309. The petitioners release was executed after full consideration of the relative advantages and after the usual give and take negotiations with respect to unliquidated claims. Congress [fol. 31] and the officials of the government may desire to exercise the greatest liberalities in dealing with the claims of contractors and courts may extend the principles of equity to the breaking point, but there can be no justification for recognizing the claims for losses presented in this case.

This Court is of the opinion that respondents are entitled to a judgment under the law for the reasons: (1) the petitioner failed to file any written request for relief for losses with the Navy Department on or before August 14, 1945; (2) that, even if petitioner had filed a written request for relief with respect to losses on or before August 14, 1945, final action on such request had been taken prior to August 14, 1945, so that relief is barred by the provisions of paragraph 204 of Executive Order 9786; and (3) that peti-

titioner's compromise on February 20, 1945, of all claims and their release bar relief and all claims held by him for the Inland Waterways, Inc., the bankrupt estate.

By The Court:

ROBERT C. BELLE,
United States District Judge.

St. Paul, Minnesota,
August 28, 1948.

Endorsed: Filed In U. S. District Court On August 28,
1948.

[fol. 32] Notice Of Appeal To The
 United States Circuit Court Of Appeals
 For The Eighth Circuit.

Notice Is Hereby Given that Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, hereby appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the entire Order granting the Respondents' (Defendants') motion for Summary Judgment, with costs, and from each and every finding and opinion in the Memorandum thereto attached and entered in this action on the 28th day of August, 1948.

BLUM & JACOBSON,
110 S. Dearborn Street,
Chicago, Illinois.

ROLLO N. CHAFFEE,
First National Bank Building,
Duluth, Minnesota.
Attorneys for Plaintiff Appellant

October 2, 1948.

Endorsed: Filed In U. S. District Court On October 21,
1948.

[fol. 35]

Statement of Points

Edward L. Fogarty, as Trustee in bankruptcy of the Inland Waterways, Inc., a corporation, appellant herein, will rely on the following points on appeal:

1. The District Court erred in granting the respondents' motion for a summary judgment.
2. The District Court erred in granting respondents' motion to dismiss the Complaint.
3. The District Court erred in finding in its Memorandum that the Petitioner Appellant failed to file any written request for relief as required by the Act under consideration by the Court and Paragraph 204 of Executive Order 9786.
4. The District Court erred in finding that Paragraph 204 of Executive Order 9786 is valid and in not finding that said Paragraph 204 of Executive Order 9786 is invalid by reason of its being unambiguous and by reason of its failing to come within the framework of the statute.
5. The District Court erred in considering the legislative history of the Act in construing the validity of Paragraph 204 of Executive Order 9786.
- [fol. 36] 6. The District Court erred in its application of the legislative history of the Act in interpreting the validity of Paragraph 204 of Executive Order 9786.
7. The District Court erred in finding in its memorandum that the Act of August 7, 1946, the act under consideration by the Court, conferred no greater rights on the petitioner than the petitioner had before the enactment of such legislation.
8. The District Court erred in construing the intention of Congress as to the purpose of the Act.
9. The District Court erred in going outside of the unambiguous language of the Act for the purpose of ascertaining the intention of Congress.
10. The District Court erred in finding, contrary to the express language of Section 3 of the Act in question, that the previous settlement entered into between the petitioner

and the Government precluded the further relief allowable to the petitioner under the Act in question.

11. The District Court erred in finding that final action had been granted on the petitioner's request for relief prior to August 14, 1945 which would bar the petitioner from obtaining further relief allowable under the Act.

12. The District Court erred in finding that the petitioner failed to file any written request for relief for losses with the Navy Department on or before August 14, 1945.

13. The District Court erred in finding that the petitioner's compromise on February 20, 1945 of all claims and the release given by the Petitioner barred further relief allowable to the petitioner pursuant to the Act in question.

BLUM & JACOBSON

ROLLO N. CHAFFEE

Attorneys for Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, Petitioner Appellant.

Endorsed: Filed in U. S. District Court on October 26, 1948.

[fol. 37] State of Minnesota,
County of St. Louis.—ss:

Rollo N. Chaffee, being first duly sworn, upon oath, says: That he is one of the attorneys for the Petitioner-Appellant in the Statement of Points hereto attached in the action therein entitled; that on the 25th day of October, 1948, he personally served said Statement of Points upon the Respondents-Appellee therein by mailing true and correct copies of said Statement of Points, each copy being enclosed in an envelope with postage prepaid and said envelopes addressed to two of the attorneys for said Respondents-Appellee as follows: One of said envelopes to Hon. John W. Graff, United States District Attorney, Federal Courts Building, St. Paul, Minnesota and the other of said envelopes to Hr. Hubert H. Margolies, At-

torney for the Department of Justice, Washington 25,
D. C.

ROLLO N. CHAFFEE

Rollo N. Chaffee

Subscribed, and sworn to before me this 26th day of
October, 1948.

(Notarial Seal)

ROBERT J. KARON,
Notary Public,
St. Louis County, Minn.

My Commission Expires Dec. 14, 1948.

[fol. 39] (Order of United States Court of Appeals pro-
viding that Original Claim involved be transmitted
by District Court for Hearing of Appeal, and Waiv-
ing Printing.)

United States Court of Appeals, Eighth Circuit

No. 13,857 November Term, 1948.

Edward L. Fogarty, as Trustee in Bankruptcy of Inland
Waterways, Inc., Appellant,

No. 883 vs. Civil

United States of America and Navy Department-War
Contracts Relief Board.

Appeal from the District Court of the United States for
the District of Minnesota.

Motion has been filed by counsel for appellant for an
order directing that the record on appeal consist of such
parts of the original papers as set forth in appellant's
"Designation of Record", or as may be changed by stipu-
lation of parties or order of this court, under Rule 75(o)
of the Rules of Civil Procedure, said rule providing that
whenever a Court of Appeals provides by rule for a hear-
ing of appeals on the original papers the Clerk of the
District Court shall transmit them to the appellate court
in lieu of copies provided for in the rule. After filing of
said motion it was suggested by the United States attor-
ney, for appellees, to counsel for appellant "that peti-
tioner-appellant would be served equally well by a printed

record containing Items 2 through 8 of the Designation, and the submitting to the Court of Appeals, the original of Item 1", being the original claim involved in this proceeding with many statements and invoices attached. This suggestion so made, it appears, meets with the approval of counsel for appellant.

Having considered said motion and correspondence, It is Ordered by the Court that the part of the record which it appears agreeable to counsel to be printed shall be printed and that the Original of Item 1 of the Designation, the claim involved herein, be transmitted by the Clerk of the District Court to the Clerk of this Court for use or examination by this Court in the consideration and disposition of this appeal, the printing thereof being by the Court hereby waived.

November 16, 1948.

Endorsed: Filed in U. S. District Court on November 24, 1948.

• • • • •
Filed Mar. 19, 1949. E. E. Koch, Clerk.

[fol. 34] And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Mr. Rollo N. Chaffee as Counsel for Appellant.)

United States Court of Appeals
Eighth Circuit

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, Appellant,
No. 13,857 vs.

United States of America and Navy Department-War Contracts Relief Board.

The Clerk will enter my appearance as Counsel for the Appellant.

BLUM & JACOBSON

ROLLO N. CHAFFEE
Attorneys for Appellant.

510 First National Bank Bldg.
Duluth, Minn.

(Endorsed): Filed in U. S. Court of Appeals, Nov. 5, 1948.

(Appearance of Mr. George M. Shkoler as Counsel for Appellant.)

The Clerk will enter my appearance as Counsel for the Appellant.

BLUM & JACOBSON

ROLLO N. CHAFFEE
GEORGE M. SHKOLER
Of Counsel.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 29, 1949.

[fol. 35] (Appearance of Mr. John W. Graff and Mr. James J. Giblin as Counsel for Appellee.)

The Clerk will enter my appearance as Counsel for the Appellee.

JOHN W. GRAFF
United States Attorney.

JAMES J. GIBLIN
Assistant United States
Attorney.

221 Federal Courts Bldg.,
St. Paul (2), Minnesota.

(Endorsed): Filed in U. S. Court of Appeals, Mar. 30,
1949.

(Appearance of Mr. Hubert H. Margolies as Counsel for
Appellee United States of America.)

The Clerk will enter my appearance as Counsel for the
United States, Appellee.

HUBERT H. MARGOLIES
Attorney, Department of
Justice,
Washington, D. C.

(Endorsed): Filed in U. S. Court of Appeals, May 5, 1949.

[fol. 36] (Order of Submission.)

May Term, 1949.
Thursday, May 5, 1949.

This cause having been called for hearing in its regular order, argument was commenced by Mr. George M. Shkoler for appellant, continued by Mr. Hubert H. Margolies, Attorney, Department of Justice, for appellee, and concluded by Mr. George M. Shkoler for appellant.

Whereupon, this cause was submitted to the Court on the printed record and the briefs of counsel filed herein.

(Opinion.)

United States Circuit Court of Appeals for the
Eighth Circuit

No. 13,857.

Edward L. Fogarty, as Trustee
in Bankruptcy of the Inland
Waterways, Inc., a Corpora-
tion,

Appellant,

vs.

United States of America and
Navy Department—War Con-
tracts Relief Board,

Appellee.

Appeal from the
United States Dis-
trict Court for the
District of Minne-
sota,

[August 24, 1949.]

Mr. George M. Shkoler (Messrs. Blum & Jacobson and Mr. Rollo N. Chaffee were with him on the brief), for Ap-
pellant.

Mr. Hubert H. Margolies, Attorney, Department of Justice
(Mr. H. G. Morison, Assistant Attorney General; Mr.
John W. Graff, United States Attorney; Mr. James
J. Giblin, Assistant United States Attorney; and Mr.
Edward H. Hickey, Special Assistant to the Attorney
General, were with him on the brief), for Appellee.

Before GARDNER, Chief Judge, and THOMAS and RIDDICK,
Circuit Judges.

RIDDICK, Circuit Judge, delivered the opinion of the Court.

The appellant, as Trustee in Bankruptcy of Inland Waterways, Inc., brought this action under the War Contracts Hardship Claims Act (Act of August 7, 1946, 41 U.S.C. 106 Note, 60 Stat. 902), popularly known as the Lucas Act, to recover of the United States \$328,804.42 as losses alleged to have been sustained by Waterways in the performance of contracts with the Navy Department. The motion of the United States for a summary judgment, based upon the allegations of the complaint and a written agreement settling certain matters in dispute between the parties, approved by the District Court in bankruptcy, was sustained. Appellant has appealed from the judgment entered on the motion. The question presented is the interpretation of the War Contracts Hardship Claims Act and of Executive Order 9786 promulgated pursuant to the Act.

The facts are undisputed. Waterways entered into several contracts with the Navy Department for the construction of submarine chasers and plane rearming boats. The first of these contracts was dated September 18, 1941, and the last, June 30, 1942. Waterways was financed with Government funds. In a relatively short time after beginning operations under the contracts, Waterways encountered financial difficulties, and in December 1942 filed a petition in the District Court for reorganization under the bankruptcy law. A trustee was appointed to take charge of Waterways' property and affairs.

Little if any progress was made in the performance of the contracts during the management of the trustee. On May 5, 1943, the United States filed claims against Waterways in the reorganization proceedings, and on July 31, 1943, the trustee filed counterclaims against the United States. The trial court described the situation at this time as follows:

"A few ships had been built and several were in the course of construction. Much of the work was incomplete and defective. Labor claims having priority under the law were pressing. Creditors and all parties concerned were desirous of effecting a settlement with the government for the funds claimed due the bankrupt under the contracts."

On February 20, 1945, the claims of Waterways against the Government and the claims of the Government against Waterways were settled by a compromise agreement which was approved by the bankruptcy court. Under the agreement the United States paid the trustee approximately \$16,000 in complete liquidation of all claims. The agreement provides:

"The Trustee, for himself, in his capacity as trustee, for his successors, and on behalf of the Contractor, its successors and assigns, remises, releases and forever discharges the Government, its officers, agents and employees and the Government remises, releases and forever discharges the Trustee and his successors and the Contractor, its successors and assigns of and from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions."

"The aforesaid contracts and transactions" are described in detail in the compromise agreement. The claims asserted against the United States by Waterways were claims for payments due Waterways under the contracts with the Navy Department and for the value of partially completed plane rearming boats and materials and equipment for their construction which the Government had taken under requisition, and for expenses incurred in the conservation of this property for the United States. The claims of the United States against Waterways included the unpaid balance of a loan to Waterways which the Government had guaranteed, and which it had been compelled to purchase on the default of Waterways, together

with interest; the cost incurred by the United States in the completion of incomplete and defective work on submarine chasers; and the decreased cost of performance to Waterways resulting from changes in the plans and specifications for the work being done under the contracts.

After the approval of the compromise settlement by the bankruptcy court and the payment by the United States of the balance due the trustee under that settlement, the trustee filed a claim with the Navy Department under the War Contracts Hardship Claims Act for the "loss" sustained by Waterways in the performance of its contracts with the Navy Department, alleging that the loss was sustained through no fault or negligence on the part of the claimant and that no other relief had been sought from the United States with respect to the loss claimed "other than that as may have been had in proceedings for the reorganization of the claimant under Chapter X" of the Bankruptcy Act. This claim was denied by the Navy Department's War Contract Relief Board on July 3, 1947, and this action for review of the decision of the Navy Department was instituted in the District Court.

The District Court granted the summary judgment from which this appeal is taken on the ground that it conclusively appeared that appellant had not filed with the Navy Department a written request for relief within the meaning of the Act, on or before August 14, 1945, as expressly required by section 3 of the Act and by paragraph 204 of Executive Order 9786; and also on the ground that, conceding that the evidence established that appellant had filed with the Navy Department the required timely written request for relief, further relief under the Act was barred by the settlement of appellant's claims against the Navy Department approved by the bankruptcy court on February 20, 1945. Appellant assigns both rulings of the District Court as error.

Since we have reached the conclusion that the trial court was correct in its ruling on the first question, we do not reach the second. For, if, as we hold, appellant never on or before August 14, 1945, filed a written request for relief under the First War Powers Act, it follows that there was never "a previous settlement" (sec. 3 of the Act of August 7, 1946) of such a claim; and the validity of that part of paragraph 204 of Executive Order 9786 providing that no claim under the Act shall be considered if final action with respect thereto had been taken on or before August 14, 1945, is not involved in the present case. The settlement of February 20, 1945, was not a settlement of claims for relief under the First War Powers Act, but was a final adjudication by the bankruptcy court of appellant's claims against the Navy Department for compensation payable under its contracts with the Navy Department and for the value of property of the appellant taken under requisition by the United States.

The War Contracts Hardship Claims Act is entitled "An Act to authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war." So far as material to decision in the present controversy, the Act provides:

Sec. 1. That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U.S.C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not in-

cluding diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency concerned or by a central authority therein designated by such head.

Section 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U.S.C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U.S.C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. * * *

Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

Sec. 6, as amended provides for review by the Federal courts of departmental action on claims under the Act.

Pursuant to section 1 of the Act, the President on October 5, 1946, made Executive Order 9786 (11 F.R. 11553) entitled "Regulations Governing the Consideration, Adjustment, and Settlement of Claims Under Public Law 657, Approved August 7, 1946." Parts of the Executive Order material here are as follows:

PART I—DEFINITIONS

101.7 The term "cost of performance" means the reasonable and necessary cost to a contractor or subcontractor of work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, determined in accordance with the accounting practices of the contractor or subcontractor consistently applied during performance of the contract or subcontract, provided such practices accord with recognized commercial accounting practices. Such cost shall include, to the extent reasonable and necessary, direct costs and a properly allocable proportion of indirect costs, but shall not include the following items:

* * * * *

n. Any item of cost which the contract or subcontract or renegotiations therefor expressly contemplated would not be reimbursed or compensated or allowed for.

101.8 The term "contract price" means the aggregate of all amounts (before taxes and statutory renegotiation) paid or payable to a contractor or subcontractor for work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, including any amounts paid or payable pursuant to any amendment, adjustment, or settlement of or on account of such contract or subcontract under the First War Powers Act, 1941, the Contract Settlement Act of 1944 (41 U.S.C., Supp. IV, secs. 101-125), or otherwise.

101.9 The term "loss" means the amount by which the cost of performance of a contract or subcontract exceeds the contract price thereof.

101.11 The term "net loss" means the amount by which the aggregate of the costs of performance under all contracts and subcontracts exceeds the aggregate of the contract prices under all contracts and subcontracts, after giving appropriate effect to action in renegotiation proceedings in respect of the statutory period.

101.12 The term "claim" means a claim for relief under the Act.

PART II—FILING OF CLAIMS

201. No claim shall be received or considered by any war agency unless properly filed in accordance with the Act and these regulations on or before February 7, 1947.

204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date.

PART III—SETTLEMENT OF CLAIMS

304. No claim shall be allowed by any war agency except if and to the extent that the war agency finds that the claim is (a) equitable under all the circumstances and (b) for losses incurred without fault or negligence on the part of the claimant.

305. No claimant shall be granted relief under the Act and these Regulations in any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant pursuant to which work, supplies, or services were furnished for the Government during the statutory period.

Section 201 of the Act of December 18, 1941 (50 U.S.C., App. 611, 55 Stat. 839), known as the First War Powers Act, provides:

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the prosecution of the war ***.

The First War Powers Act was entitled "An Act to Expedite the Prosecution of the War Effort." The Congressional purpose is made clear by the first section of the Act. The powers therein conferred upon the President are conferred "for the national security and defense; for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy."

The documents upon which appellant relied as written requests for relief under the Act of August 7, 1946, filed with the Navy Department on or before August 14, 1945, were all before the trial court on the motion for summary judgment. They can not be accepted as written requests for relief from losses on the Waterways contracts within the meaning of the Act. They are the identical claims of Waterways against the Navy Department which were finally settled by the agreement of February 20, 1945, approved by the bankruptcy court. They are in no sense claims for "losses * * * incurred * * * without fault or negligence * * * in the performance" of the Waterways contracts, as the word "loss" is used in sections 1 and 3 of the Act and defined in paragraphs 101.9 and 101.11 of Executive Order 9786. They do not purport to be a claim for the difference between the contract price for the performance of any of the Waterways contracts and the actual cost to Waterways for such performance, the claim involved in this action and presented to the Navy Department for the first time in February 1947. They are, in other words, claims for which, if established, the United States was liable at law to Waterways, and for the recovery of which Waterways was entitled to maintain an action at law against the United States.¹ And they were

¹28 U.S.C., 1346, 1491.

so treated when finally adjudicated in the bankruptcy court. They are not "equitable" claims within the meaning of the Act.

The Act has no relation to claims against the United States of the character stated in appellant's bills and invoices. On the contrary, the Act deals with an entirely different character of claims, namely, claims for which the United States was never by the force of the contracts obligated, and which but for section 201 of the First War Powers Act and the provisions of the Act of August 7, 1946, no executive or judicial branch of the Government could have entertained or allowed. Claims against the United States with which the Congress was concerned in the Act of August 7, 1946, are claims for losses which a department of the Government could have entertained under section 201 of the First War Powers Act; and claims allowable under the First War Powers Act are not such as the Government was obligated at law to pay, but claims whose recognition and allowance, in the opinion of the department concerned, were necessary to the national security, and whose allowance would, in the opinion of the department, "facilitate the prosecution of the war." Title 1, Paragraph 3, Executive Order 9001, December 29, 1941, 6 F.R. 6787. The primary purpose of the First War Powers Act was the promotion of the national defense in time of great emergency. Contractors were the incidental beneficiaries of the Act. The purpose of the Act of August 7, 1946, as shown by the language of the Act and its legislative history² was to secure equal and equitable treatment to contractors in the consideration of claims of the kind which the First War Powers Act authorized certain departments of the Government to allow.

The judgment of the District Court is affirmed.

²H. Rep. 2576, 79th Cong., 2d Sess., pp. 1-21, July 19, 1946; U.S. Code Cong. Service, 1946, p. 1443.

[fol. 48]

(Judgment.)

United States Court of Appeals for the Eighth Circuit

May Term, 1949.

Wednesday, August 24, 1949.

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, Appellant,

No. 13,857 vs.

United States of America and Navy Department-War Contracts Relief Board.

Appeal from the United States District Court for the District of Minnesota.

This Cause came on to be heard on the transcript of the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 24, 1949.

[fol. 49]

(Clerk's Certificate.)

United States Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeal from the United States District Court for the District of Minnesota was heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Court of Appeals for the Eighth Circuit, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Court of Appeals wherein Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a Corporation, was Appellant, and United States of America and Navy Department-War Contracts Relief Board, were Appellees.

I do further certify that on the 13th day of September, A. D. 1949, a mandate was issued out of said Court of Appeals in said cause, directed to the Judges of the United States District Court for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this 11th day of January, A. D. 1950.

E. E. KÖCH,

Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.

(Seal)

[fol. 48] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1949

No. —

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the Inland
Waterways, Inc., a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR
CONTRACTS RELIEF BOARD

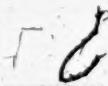
ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI

Upon Consideration of the application of counsel for
petitioner,

It Is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including January 20, 1950.

Tom C. Clark, Associate Justice of the Supreme
Court of the United States.

Dated this 22nd day of November, 1949.



[fol. 49] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 13, 1950

The petition herein for a writ of certiorari to the United
States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

Mr. Justice Douglas took no part in the consideration or
decision of this application.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [REDACTED] 6

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF
THE INLAND WATERWAYS, INC., A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

SAMUEL F. JACOBSON,
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF
THE INLAND WATERWAYS, INC., A CORPORATION,
Respondents.

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

MAY IT PLEASE THE COURT:

Your petitioner, Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, respectfully prays that a Writ of Certiorari issue to review a final order of the United States Court of Appeals of the Eighth Circuit which, in affirming an order of the United States District Court for the District of Minnesota, determined that the petitioner had no right to present a claim for relief pursuant to Public Law 657, 60 Stat. 902, 41 U. S. C. A. Par. 106 Note, and popularly known as the Lucas Act.

SUMMARY AND STATEMENT OF MATTERS INVOLVED.

The petitioner, as Trustee in Bankruptcy, prior to VJ Day, August 14, 1945, had asserted various claims against the Navy Department of the United States on certain contracts and supplements thereto. Prior to the enactment of legislation popularly known as the Lucas Act (Public Law 657, Act of August 7, 1946, 41 U. S. C. A. Par. 106 Note, 60 Stat. 902) the petitioner and respondent, United States of America, entered into an agreement settling the claims of the petitioner and releasing the respondent of all claims as a result of the said contracts and transactions.

This matter involves a claim arising out of said contracts and supplemental contracts sought to be allowed pursuant to the provisions of a statute popularly known as the Lucas Act, Public Law 657, 79th Congress, and is entitled "An Act to Authorize Relief in Certain Cases Where Work, Supplies, or Services Have Been Furnished for the Government Under Contracts During the War."

The District Court for the District of Minnesota, 5th Division, on August 28, 1948, 80 Fed. Supplement 90, by an "Order granting Respondent's Motion for Summary Judgment" (Rec. p. 16) dismissed the instant proceedings. The motion for Summary Judgment was based solely on the pleadings and an exhibit attached to the Motion which is a certified copy of a settlement agreement. No evidence was taken; no witnesses were sworn; the disposition of the rights of the petitioner were decided on the pleadings alone. There is an issue of fact which can only be determined upon a hearing on the merits.

The issues involved in the granting of respondent's Motion to Dismiss are interpretations as to the meaning and purpose of the legislation upon which the petitioner's claim is based and a final decision as to the nature and intendments to the Lucas Act will affect all of the litigation now pending and undetermined in various United States Courts throughout the nation.

The fundamental issue involved in this and in all of the other cases pending in United States Courts is whether the Lucas Act above referred to is merely an extension of the First War Powers Act or whether it is legislation which intended relief to all contractors, subcontractors, and materialmen who suffered losses on the sum total of all of their war contracts with the government, without fault or negligence on their part.

In the event the conclusion would be that the Lucas Act is merely an extension of the First War Powers Act of 1941, then the test of whether or not a claimant could recover any losses may be measured by whether such a recovery would, in the language of the Court of Appeals in these proceedings, promote "the national defense in time of great emergency. Contractors were the incidental beneficiaries of the Act."

If, however, the conclusion is (and the petitioner contends that it is inescapable) that the Lucas Act goes far beyond the purposes of the First War Powers Act of 1941 and intended a fair and equitable settlement of claims for losses incurred without fault or negligence on the part of the contractor, subcontractor, or materialman, then we must measure the claims filed on the equitable principles so clearly and adequately set forth in the Act itself.

The questions presented are set forth herein under that title.

This is the fundamental issue involved, but other issues

must be determined which will affect not only the instant proceeding but practically all of the other pending claims under the Lucas Act.

These issues briefly summarized are:

(1) Whether petitioner's claim under the Lucas Act discloses any written request for relief as required by the Act.

(2) The validity of Paragraph 204 of Executive Order 9786 which were purportedly promulgated pursuant to the provisions of the Lucas Act.

(3) Whether petitioner's claim is barred by the execution of a settlement agreement between the petitioner and the respondent which was entered into prior to the passage of the Lucas Act.

The petitioner filed an appeal from the Order of the District Court, dismissing the proceedings. An appeal was taken to the United States Court of Appeals for the Eighth Circuit which affirmed the order of the District Court in 176 Fed. 2nd 599 (Rec. 36) on August 24, 1949.

STATEMENT AS TO JURISDICTION OF THIS COURT TO GRANT CERTIORARI.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (Judicial Code, Section 1254) and under Section 2 of Article III of the Constitution of the United States. The subject matter involves the interpretation of a Federal Statute—Public Law 657, 41 U. S. C. A., Par. 106, Note, 60 Stat. 902.

THE STATUTE INVOLVED.

The statute involved is Public Law 657 (79th Congress, Chapter 864—2nd Session) 41 U. S. C., Par. 106, Note, 60 Stat. 902, and popularly known as the Lucas Act.

The Act is set forth in full in the Appendix.

DATE OF JUDGMENT OF DECREE SOUGHT TO BE REVIEWED AND REFERENCE TO THE DECISIONS OF THE COURT OF APPEALS AND THE DISTRICT COURT.

The decision sought to be reviewed is that of the United States Court of Appeals for the Eighth Circuit, entered on August 24, 1949, and reported in 176 Fed. 2nd 599 (Rec. P. 36). The decision of the Court of Appeals sustained the order of the District Court of Minnesota, 49 Fed. Supp. 675, entered on August 28, 1948 (Rec. P. 16). This Court, by an order dated the 22nd day of November, 1949, upon application of counsel for the petitioner, extended the time for the filing of the Writ of Certiorari to January 20, 1950.

THE QUESTIONS PRESENTED.

1. Is the Lucas Act (Public Law 657) merely an extension of the First War Powers Act of 1941 or is it legislation designed for the purpose of granting equitable relief entitling contractors, subcontractors, and material-men to recover losses on war contracts incurred without fault or negligence on their part?
2. Does the petitioner's claim filed pursuant to said Act disclose a written request for relief as required by said legislation?
3. Is petitioner's claim barred by the execution of a settlement agreement between the parties, which was entered into prior to the enactment of the Lucas Act?
4. Are Paragraphs 204 and 307 of Executive Order 9786, purportedly promulgated pursuant to the provisions of the Lucas Act, valid or are they contradictory to the provisions of the Lucas Act so that they cannot be invoked against petitioner?

7

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The Court of Appeals has decided important questions of Federal Law which have been the subject matter of conflicting decisions in the courts, and which have not been, but should be settled by the Supreme Court.

The issues involved in these proceedings have been subject to varying and conflicting interpretations of many Courts, some of which sustain the interpretations of the Lucas Act as contended for by the petitioner and some of which lend an interpretation to the Act contended for by the respondent.

As far as we have been able to ascertain, the cases which sustain the petitioner's position are as follows:

Warner Construction Co. v. Krug et al. (80 Fed. Supp. 81 In the District Court of the United States for the District of Columbia).

Stephens Brown, Inc. v. United States (81 Fed. Supp. 969 In the District Court of the United States for the Western Division of the Western District of Missouri).

Howard Industries, Inc. v. United States. (Court of Claims No. 48874).

Milwaukee Engineering and Ship Building Co. v. United States (Court of Claims No. 48888).

Modern Engineering Co. v. United States (Court of Claims No. 48876).

Warner Construction Co. v. United States (Court of Claims No. 48871).

Centquer Construction Co., Inc. v. United States (Court of Claims No. 48869).

The cases holding contrary to these decisions are:

Jardine Mining Co. v. R. F. C. (Case No. 2843-47

In the District Court of Columbia).

Acme Fur Dressing Co. v. United States (80 Fed.

Supp. 927 In the District Court of the United States for the Eastern Dist. of New York).

Fogarty v. United States (the instant case) (Case No. 13,857, also cited as *In re: Inland Waterways, Inc.* (49 Fed. Supp. 675 In the District Court of Minnesota) and in the Court of Appeals in 176 Fed. 2nd 599).

F. G. Vogt & Sons v. United States (79 Fed. Supp. 929 in United States District Court for the Eastern District of Pennsylvania).

Davidson v. United States (82 Fed. Supp. 420 (D. D. C.)).

The decisions above referred to present a direct and serious conflict in the interpretation of the Lucas Act and the provisions of Executive Order 9786 purportedly promulgated pursuant thereto. There are many cases still pending in the lower courts involving this Act so that the questions presented in this Petition for a Writ of Certiorari involve issues of general importance and substance which should be determined by this Court.

The questions involved are:

I.

Does Petitioner's Claim, Filed Pursuant to the Lucas Act, Indicate That a Proper Written Request for Relief Was Filed, Within the Meaning of the Act?

The statute under consideration is popularly known as the Lucas Act, Public Law 657, 79th Congress, and is entitled "An Act to Authorize Relief in Certain Cases

Where Work, Supplies, or Services Have Been Furnished
For the Government Under Contracts During the War."

The Act is brief and we have set forth the same in full in the Appendix.

The portions of Executive Order 9786 which are entitled "Regulations Governing the Consideration, Adjustment, and a Settlement of Claims Under Public Law 657, Approved August 7, 1946" and which are pertinent to the issues involved in these proceedings are as follows:

"204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date."

"307. Relief with respect to a particular loss claimed shall not be granted under this Act and these Regulations unless the war agency considering the claim finds, or, in case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945."

A mere reading of the language of the Act, and that especially set forth in Section 3 thereof, and the portions of Executive Order 9786 above set forth will indicate contradictions between the Act and the portions of the Executive Orders referred to, with respect to what constitutes "a written request for relief."

* The District Court and the Court of Appeals for the Eighth Circuit contend that the plaintiff is not entitled to relief under this Act by reason of the fact that the plain-

tiff had not filed a written request for relief from losses *within the meaning of the Act.*

The opinions of said Courts do not contend that the plaintiff filed no written request for relief whatsoever. The opinion of the District Court merely sets forth that "It is not sufficient that a request for some sort of relief was filed. A request for relief from a loss must definitely be a request for an amendment to a contract without consideration under the First War Powers Act" (Printed Record, page 19). In the prior paragraph of the court's opinion, the District Court expressed this interpretation of the Act:

"Congress under the Act of August 7, 1946 intended to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945" (Printed Record, page 19).

The Court of Appeals is of the same opinion. This is indicated in 176 Fed. 2nd 599, at Page 601 (Record, page 40) wherein the Court of Appeals holds:

"For, if, as we hold, appellant never on or before August 14, 1945, filed a written request for relief under the First War Powers Act, 50 U. S. C. A. Appendix, Par. 601, *et seq.*, it follows that there was never 'a previous settlement' (sec. 3 of the Act of August 7, 1946) of such a claim; and the validity of that part of paragraph 204 of Executive Order 9786 providing that no claim under the Act shall be considered if final action with respect thereto had been taken on or before August 14, 1945, is not involved in the present case."

The above statement of the law is violently opposed to the interpretation of the Lucas Act contended for by this petitioner and the opinions of other Courts, which opinions we shall call to the Court's attention. The Circuit Court

in this case insists that the Lucas Act is a mere extension of the First War Powers Act, 1941; other Courts and the petitioner contend that the Lucas Act is a remedial bit of legislation wholly independent of the First War Powers Act, 1941 and is intended to go far beyond the relief granted by the First War Powers Act, 1941.

The material variance between the Act and the regulations referred to is condemned by the Courts in the following cases:

Stephens-Brown, Inc. v. United States, 81 Fed. Supp. 969.

Warner Construction Co. v. Krug, et al., 80 Fed. Supp. 81.

Howard Industries, Inc. v. United States, Court of Claims No. 48874

and other opinions of the United States Court of Claims previously referred to.

The decision of the Court of Appeals, however, to the effect that Congress intended to limit consideration to a request for relief from laws under the First War Powers Act has no basis in fact and nowhere in the Act is there any language by which such a conclusion can be gleaned. An examination of the claim that was filed with the District Court on April 2, 1948 (Printed Record, pages 32 and 33), setting forth the counterclaim of the trustee to the claim of the Government in the bankruptcy proceedings and the numerous billings and other exhibits attached to said claim clearly indicates that numerous requests for relief were filed prior to August 14, 1945. The amount which may be due to the claimant is, of course, restricted to the amount which might have been allowed by the depart-

ment or agency concerned and can only be determined after a hearing of this cause on its merits.

The Court of Claims in *Howard Industries, Inc. v. U. S.*, Court of Claims No. 48874 at page 10 of its decision, sets forth its conclusions in this connection as follows:

"The requirement contained in Section 3 of the Lucas Act that claimants must have filed a written request for relief prior to August 14, 1945, merely means, we think, that claimants must be able to show that they had made timely (that is, prior to August 14, 1945) protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims. This the plaintiff has done by three letters referred to earlier in this decision."

H.

Are Paragraphs 204 and 307 of Executive Order 9786, Promulgated Pursuant to the Lucas Act, Invalid as Being in Conflict With and Contradictory to the Act?

Section 204 of Executive Order 9786 reads as follows:

"No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date."

(Underscoring ours.)

Section 2(a) of the Act provides in part that the board in arriving at a fair and equitable settlement of claims under this Act:

"* * * shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotia-

tion Act (50 U. S. C. Supp. IV, App. Sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, Sec. 101-125), or similar legislation; (2) relief granted under Section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act." (Underscoring ours.)

This section of the Act is followed by Section 3 which provides in part, "**** but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." (Underscoring ours.)

The language of the Act in the two sections above quoted is clear and explicit. There is no ambiguity contained in the language thereof.

After reading Section 2(a) and 3 of the Act, we come to the consideration of the force and effect, if any, of Section 204 of Executive Order 9786. The language therein contained "and no claim shall be considered if final action with respect thereto was taken on or before that date." (August 14, 1945), is clearly and diametrically opposed to the plain and explicit language of the Act above referred to.

The Act, by its plain language, does not and was not intended to limit the scope of the Act to an extension of the First War Powers Act, 1941. The statute under consideration by the Court does not state that it is an extension of the First War Powers Act, 1941. And when the language of Section 3 of the Act is read, providing that a previous settlement shall not operate to preclude further relief, the inconsistency of Executive Order 204 becomes all the more apparent.

The District Court and the Court of Appeals have sought to apply rules of construction to a clear and unambiguous Act which is not subject to the type of statutory interpreta-

tion that we find in statutes which are not so clear and explicit. The Courts consider those latter statutes ambiguous and, therefore, look to sources other than the language therein contained in order to ascertain the meaning thereof.

We can find no clearer or simpler statement of the Law than is found in 50 American Jurisprudence at page 204, reading from Paragraph 225:

"A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

The above statement of the Law is supported by numerous decisions, both state and federal. Typical decisions are: *Browder v. U. S.*, 312 U. S. 335; *Walker v. U. S.*, 83 Fed. 2nd 103; *Osaka Shosen Kaisha Lines v. U. S.*, 300 U. S. 98, 81 L. Ed. 532, 57 S. Ct. 356; 59 Corpus Juris 952.

• Certainly under the statute before the Court the President would have the right to promulgate regulations which would provide for the manner, form and time for the filing of claims and other administrative rules and regulations with reference to the presentation of the claims. Nowhere in this Act is there any authorization giving the President or the Board legislative powers. The President cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Neuberger v. Commissioner*, 311 U. S. 83; 85 L. Ed. 58.

The District Court and the Circuit Court of Appeals for the Eighth Circuit have held that the Act limits recovery to First War Powers Act standards. The only reference to the First War Powers Act that stands by itself is a statement in the first paragraph of the Act that the work, etc. should have been furnished to a department or agency *which had been authorized to enter into contracts* and under Section 201 of the First War Powers Act. No issue is raised in this case that the contract of the petitioner with the Government is not within that class. The contract of the petitioner with the Government upon which claim was filed before the Board and which is here pending before the Court meets the requirements of that section of the Act. The regulations, however, are not content with carrying out the express provisions of the Act in accordance with the language therein contained, but they seek to construe a statute where the statute itself, by reason of its unambiguity, is not subject to construction. The District Court as does the Circuit Court of Appeals seems insistent that the Act before the Court is nothing more than an extension of the First War Powers Act and in justification of their position and interpretation insist that their conclusion is the only one tenable because they read the Act "in the light of its legislative background".

The language of all the courts is strong with regard to the rules regarding construction of statutes, and in each case it is the clear and unmistakable rule of law that the language of the Act itself must be followed by the courts where the statute is clear, uncontradictory and contains no ambiguities. The courts below do not contend and have made no contention that the statute before the Court for consideration is not clear, certain, or unambiguous.

Our contention is adequately supported by the finding of Judge Holtzoff in the case of *Warner Construction Co. v. Krug, et al.*, District Court of the United States for the District of Columbia, 80 Fed. Supp. 81, and also by Judge Albert L. Reeves in the case of *Stephens-Brown, Inc. v. United States*, 81 Fed. Supp. 969, in which case the court stated:

"The contention of the defendant that the claim of May 8, 1944 was denied, and, therefore, under Executive Order 9786 the plaintiff is debarred the right of recovery is untenable. Apparently the Executive Order was prepared in the light of the bill as originally introduced. Paragraph 204 of said Order specifically denies relief where final action with respect to a claim was taken before August 14, 1945. The Executive Order in that regard contravenes the express provisions of the statute which specifically provides, 'but a previous settlement under the First War Powers Act, 1941 or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.'" (Underscoring ours.)

Judge Holtzoff, in *Warner v. Krug*, above cited, held:

"It is claimed by Government counsel it was the intention of the Congress in passing the Act of August 7, 1946, to do nothing more than continue the authority of Government agencies to settle contracts under the First War Powers Act.

"In support of this contention, Government counsel

refers to various statements made by members of Congress on various occasions. Such statements, however, cannot contradict the unambiguous provision of the statute.

"It is important in this connection to note that when the bill was originally introduced it was much more narrow in its scope than the form in which it finally passed, and it may well be that some of the statements to which counsel refers had reference to the legislation in its original form. The Bill as originally introduced contained a proviso that it should not be applicable to cases submitted under the First War Powers Act, which had been finally disposed of prior to August 14, 1945, and it is significant to observe that this proviso was stricken from the measure in the course of its passage and instead the provision which now appears as the last clause of Section 3 was inserted, affirmatively providing that a previous settlement under the earlier statute shall not operate to preclude further relief otherwise allowable under the Act.

"This legislative history throws a very significant light on the intent of Congress and accentuates the unambiguous meaning of the last clause of Section 3. It is obvious that it was the intention of Congress that a prior settlement under the earlier statute should not operate to preclude the granting of further relief under the 1946 Act.

"With the policy or expediency of this legislation, the Court has no concern. It is the duty of the Court to enforce the statute as it is written, especially in view of the fact that it is unambiguous.

"In so far as Sections 204 or 307 of the rules and regulations promulgated under the statute may be inconsistent with Section 3 of the Act, these regulations must be deemed invalid, because it is elementary law that executive regulations promulgated for the purpose of carrying the statute into effect must be within the framework of the statute and may not be inconsistent with the statute.

"On the basis of these contradictions, the motion of the defendant for summary judgment will be denied."

The opinions above clearly represent the position of the petitioner in these proceedings.

Paragraph 204 of the Executive Order in question, obviously was written to cover provisions of the original bill which were clearly and specifically rejected by Congress and never passed.

The Executive Department attempts to make effective a provision which Congress expressly repudiated.

The United States Court of Appeals (D. C. Cir.) in *Border Pipe Line Co. v. Federal Power Commission*, 171 Fed. 2nd 149, 152 (Nov. 22, 1948) holds: "We cannot write into an Act of Congress a provision which Congress affirmatively omitted."

The limitations set forth in the provisions of Executive Order 9786 apparently were drafted on the basis of the Act as *originally* introduced and are clearly not regulations covering the Act in its final form. Those regulations under the guise of being promulgated for the purpose of administering the Act limits restrictions and nullifies the clear, unmistakable, unambiguous language, spirit and purpose which is set forth in the legislation by virtue of which the petitioner has sought this remedy.

III.

Does the Settlement Agreement of February 20, 1945, Bar the Right of the Petitioner to Maintain His Action?

The consideration by the District Court of the effect of the settlement agreement is again based not upon any language of the Act.

The District Court again has failed to read the unambiguous language of the statute and it is the Court's observation, (Printed Record, page 28):

"The legislative history is barren of any suggestion

that a binding and valid compromise, resulting from negotiations of the interested parties supported by a consideration on both sides followed by an exchange of releases may be disregarded by claimants to the gratuity extended to the Act of August 7, 1946."

Judge Holtzoff in *Warner Construction Co. v. Krug*, 80 Fed. Supp. 81, effectively deals with this contention as follows:

"The Government contends that this action does not apply because the plaintiff's claim had been adjusted and settled under the First War Powers Act. This adjustment and settlement being embodied in an amendatory contract between the plaintiff and the Government. This amendatory contract contains a general relief, running from the plaintiff to the government.

"Ordinarily, such a settlement, and particularly such a general release, would necessarily preclude the assertion of claims for any additional payments under the contract to which the settlement related.

"Section 3 of the Act of August 7, 1946, however, contains the following provision:

'A previous settlement under the First War Powers Act of 1941, or under the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under this Act.'

It is contended by the plaintiff that this provision waives the definitive effect of the previous settlement and waives the rights of the government under the general release which it had received.

"Obviously the Congress has the right to waive a release in behalf of the government and it would seem under a liberal construction of this provision that this is just what the Congress did.

"The Government claims, however, that the term 'settlement' should be limited to a unilateral adjustment of a claim made by a government agency, and

does not extend to agreements embodied in a contract, or a settlement embodied in a contract.

"In other words, the Government claims that if the administrative agency had settled the claim, that settlement would not preclude further relief. But because the settlement was embodied in the bilateral contract or agreement, which included a release, that such a settlement is not waived by the Act of Congress.

"The Court is unable to find a tenable basis for the Government's contention. The statute is clear and unambiguous. It provides that a previous settlement under the prior Act shall not operate to preclude further relief otherwise allowable under the Act.

"A settlement consummated by bilateral agreement is just as much a settlement as a unilateral adjustment or allowance of a claim. The term 'settlement' covers both methods of adjusting a claim.

"It is obvious to the Court that it was the intention of the Congress, by the Act of August 7, 1946, to authorize Government agencies to make adjustments of claims in addition to any adjustment which had been previously made. Further, a court review was provided for in the 1946 Act, which had not been provided for in the original First War Powers Act."

The statute does not provide, nor are there any combinations of words or phrases that can give rise to any such conclusions, that the previous settlement referred to in the Act must have had new circumstances arising subsequent to the settlement to afford further relief.

The reading into the Act of something that is not there is apparent in the *United Concrete Form Products Company, Inc.*: decision of the Navy Department Board, Commerce Clearing House, 4 C. C. F. Par. 60,449, referred to in the District Court's memorandum (Printed Record, page 24) in which the argument is made, that in order for a claim to be otherwise allowable, the right to further relief under the First War Powers Act as to certain por-

tions of the claim would have to be specifically reserved for further consideration by the terms of the settlement itself, or a new request for relief, upon which final action was not taken before August 14, 1945 would have to be submitted.

There is not one word in the Act to support such a conclusion. The contention that for a claim to be otherwise allowable after a settlement has been made, the right to further relief would have to be specifically reserved for further consideration by the terms of the settlement itself, is a construction of language opposed to the plain language in the Act itself.

The legislature has seen fit to allow contractors and subcontractors to obtain reimbursement for the net losses on their Government contracts. That such relief is to be granted in this case is apparent by *the clear statement that a previous settlement shall not operate to preclude relief otherwise allowable under the Act*. It is not for the President or any other administrative agency to enact new legislation by promulgating rules which emasculate the purposes of the Act.

Section 204 of the Executive Orders " * * * and no claims shall be considered if final action with respect thereto was taken on or before that date" (August 14, 1945) is diametrically opposed to the language of Section 3 of the Act which provides that a previous settlement shall not operate to preclude further relief *otherwise allowable under the Act*.

The words of the legislature must be taken in their plain and literal meaning. The plain and obvious language thereof should not be tortured so that the clear and stated word becomes nullified by construction that involves absurdity or contradiction. The statute, being clear and unambiguous, is not subject to construction.

The United States Court of Claims in *Howard Industries, Inc. v. The United States*, No. 48874, decided April 4, 1949, holds at the bottom of page 8 of its opinion:

"Paragraph 204 of the Executive Order is merely a paraphrasing of the provision so omitted and is in direct conflict with the wording of the Lucas Act as enacted and with the intent revealed in its legislative history. Our conclusion is contrary to the decision of the District Court in the case of *Fogarty v. United States*, 80 Fed. Supp. 90, which case we have examined with care, but with which we find ourselves unable to agree." (Underlining ours.)

Conclusion.

In setting forth Petitioner's reasons for the granting of a Writ of Certiorari, we have attempted to limit the discussion to indicate the fact that there are important questions of federal law regarding which many courts of the United States are in violent disagreement and which are still pending before courts throughout the nation.

These important questions have not been, but should be, settled by the Supreme Court. The Petitioner is not appending a supporting brief or argument on any of the other propositions of law or fact involved in the interest of brevity and for the reason that such a brief may deal with the merits which is a discussion not contemplated by the Rules of this Court in a Petition for a Writ of Certiorari.

The Petitioner believes that this Petition sets forth important questions of federal law which, in the public interest, requires the granting of a Writ of Certiorari as herein prayed.

In the event this prayer is granted, the Petitioner desires to submit a brief fully discussing the issues raised in this Petition.

Respectfully submitted,

EDWARD L. FOGARTY,

*As Trustee in Bankruptcy of the
Inland Waterways, Inc., a corpora-
tion,*

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APPENDIX.

STATUTES AND EXECUTIVE ORDERS INVOLVED.

(Public Law 657—79th Congress.)

(Chapter 864—2d Session.)

(S. 1477.)

41 U. S. C. 106 Note, 60 Stat. 902.

Act of August 7, 1946.

AN ACT

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without

fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency concerned or by a central authority designated by such head.

Sec. 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940 and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six

months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

Sec. 4. Appropriations or funds available for work, supplies, or services of the character involved in the respective claims at the time of settlement thereof shall be available for payment of the settlements: Provided, That where no such appropriations are available, appropriations for payment of such settlements are hereby authorized.

Sec. 5. Each department and agency shall report to the Congress quarterly the name of each claimant to whom relief has been granted under this Act, together with the amount of such relief and brief statement of the facts and the administrative decision.

Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim, and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

Approved August 7, 1946.

Section 37 of P. L. 773, 80th Cong., 2d Sess., approved June 25, 1948, revising 28 U. S. C., amended Sec. 6 as follows:

"Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed \$10,000 in amount or suit has heretofore been brought or is brought within 30 days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory act, be transferred to the Court of Claims for original disposition in that court."

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Supreme Court of the United States

OCTOBER TERM, 1950.

No. 551

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF
THE INLAND WATERWAYS, INC., A CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPART-
MENT—WAR CONTRACTS RELIEF BOARD,

Respondents.

BRIEF AND ARGUMENT OF PETITIONER.

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IN THE.....

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 551

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF
THE INLAND WATERWAYS, INC., A CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPART-
MENT—WAR CONTRACTS RELIEF BOARD,

Respondents.

BRIEF AND ARGUMENT OF PETITIONER.

THE OFFICIAL REPORTS OF THE OPINIONS
DELIVERED BY THE COURTS BELOW.

The decisions sought to be reviewed are:

- (1) that of the United States Court of Appeals for the Eighth Circuit, entered on August 24, 1949, and reported in 176 Fed. 2nd 599 (Rec. p. 36) sustaining:
- (2) the decision of the District Court of the United States for the District of Minnesota, 5th Division, 49 Fed. Supp. 675, entered on August 28, 1948 (Rec. p. 16).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254 (Judicial Code, Section 1254) and under Section 2 of Article III of the Constitution of the United States. The subject matter involves the interpretation of a Federal Statute—Public Law 657, 41 U. S. C., Par. 106, Note, 60 Stat. 902.

STATEMENT OF THE CASE.

The petitioner, as Trustee in Bankruptcy of Inland Waterways, Inc., brought this action under the War Contracts Hardship Claims Act (Lucas Act, Act of August 7, 1946, 41 U. S. C. 106, Note, 60 Stat. 902) (Appendix, p. i) to recover of the United States \$328,804.42 as losses alleged to have been sustained by the bankrupt in the performance of certain contracts with the Navy Department.

The District Court sustained a motion of the United States for a summary judgment (Rec. p. 17) based solely upon the allegations of the complaint and a written agreement which had settled certain matters in dispute between the parties, which agreement was approved by the District Court in certain bankruptcy proceedings, in another case. The petitioner appealed from said judgment to the United States Court of Appeals for the Eighth Circuit which affirmed the judgement of the District Court (Rec. p. 36).

The motion for a summary judgment in the District Court (Rec. p. 8) was based solely on the pleadings and an exhibit (Rec. p. 9) attached to the Motion which is a

copy of the Settlement Agreement. No evidence was taken; no witnesses were sworn; the disposition of the rights of the petitioner were decided on the pleadings alone—on questions of law. There remains an issue of fact which can only be determined upon a hearing on the merits.

The issues involved in the granting of respondent's Motion to Dismiss (Rec. p. 8) deal only with questions of law in the interpretations as to the meaning and purpose of the legislation upon which the petitioner's claim is based. (Lucas Act, Act of August 7, 1946, Appendix, p. i).

A decision by this Court on those questions of law will affect all of the cases involving that Act which are now pending and undetermined in various United States Courts throughout the nation.

The broad fundamental issue involved in this and in all of the other cases now pending is whether the Lucas Act above referred to is merely an extension of the First War Powers Act, 1941 or whether it is legislation which intended to grant relief to all contractors, subcontractors, and materialmen who suffered losses on the sum total of all of their war contracts with the Government, without fault or negligence on their part.

In the event the conclusion would be that the Lucas Act is merely an extension of the First War Powers Act, 1941, there would then be a basis for the opinions of the Courts below.

If, however, the conclusion is (and the petitioner contends that it is inescapable) that the Lucas Act goes far beyond the purposes of the First War Powers Act, 1941 and intended to grant a fair and equitable settlement of claims for losses incurred without fault or negligence on the part of the contractor, subcontractor, or materialmen, then the opinions of the Courts below are erroneous and we then must measure the claims filed, on the equitable

~~principles~~ so clearly and adequately set forth in the Act itself, and allow the petitioner's claim pursuant to the formula set forth in the Act.

The questions presented and a specification of such of the assigned errors as are intended to be urged are set forth herein under the title of "Assigned Errors".

This is the fundamental issue involved, but other issues must be determined which will affect not only the instant proceeding but practically all of the other pending claims under the Lucas Act.

These issues briefly summarized are:

- (1) Whether petitioner's claim under the Lucas Act discloses any written request for relief as required by the Act.
- (2) The validity of Sections 204 and 307 of Executive Order 9786 which were purportedly promulgated pursuant to the provisions of the Lucas Act.
- (3) Whether petitioner's claim is barred by the execution of a settlement agreement between the petitioner and the respondent which was entered into prior to the passage of the Lucas Act.
- (4) Whether the War Contracts Hardship Claims Act (Lucas Act) is merely an extension of Section 201 of the First War Powers Act, 1941, or whether it is an Act which is broader in scope and was intended to go far beyond the relief which could have been granted under the First War Powers Act, 1941, by granting equitable relief entitling contractors, subcontractors, and materialmen to recover losses on war contracts incurred without fault or negligence on their part.

The petitioner filed an appeal from the Order of the District Court dismissing the proceedings (Rec p. 16). An appeal was taken to the United States Court of Appeals

for the Eighth Circuit which affirmed the order of the District Court in 176 Fed. 2nd 599 (Ree. p. 36) on August 24, 1949.

The statute involved is Public Law 657 (79th Congress, Chapter 864—2nd Session) 41 U. S. C., Par. 106, Note, 60 Stat. 902, and popularly known as the Lucas Act.

The Act is set forth in full in the Appendix, p. i.

The regulations involved are Sections 204 and 307 of Executive Order 9786 (11 F. R. 11553) and are set forth in full in the Appendix, p. iv.

ASSIGNED ERRORS.

The Courts below erred:

1. By holding that the War Contracts Hardship Claims Act (Lucas Act, Public Law 657) (Appendix, p. i) is merely an extension of the First War Powers Act, 1941; and by not finding that said legislation was designed for the purpose of granting equitable relief which would entitle contractors, including the petitioner, to recover losses on war contracts which were incurred without fault or negligence on their part.
2. By holding that petitioner's claim (Rec. p. 32, 33) failed to disclose a written request for relief required by the Act involved; and by not finding that the petitioner's claim discloses proper written requests for relief as contemplated by the Lucas Act.
3. By holding that petitioner's claim (Rec. p. 32, 33) is barred by the Settlement Agreement (Rec. p. 9) between the petitioner and the Government, entered into prior to the enactment of the legislation involved herein; and by not holding that petitioner is entitled to relief under Section 3 (Appendix, p. ii) of the Act which provides: " * * * but a previous settlement under the First War Powers Act, 1941 or the Contract Settlement Act of 1944 shall not operate to preclude relief otherwise allowable under this Act."
4. By holding that Sections 204 and 307 of Executive Order 9786 (Appendix, pp. vi, vii) are valid regulations promulgated pursuant to the Lucas Act; instead of finding that said Sections 204 and 307 of Executive Order 9786 are regulations which contain provisions in conflict with the Act and which are therefore invalid.

POINTS RELIED UPON AND TO BE ARGUED AND
AUTHORITIES IN SUPPORT THEREOF.

I.

THE PETITIONER'S CLAIM (REC. PAGES 32, 33) CONTAINS A PROPER WRITTEN REQUEST FOR RELIEF PURSUANT TO THE REQUIREMENTS OF THE WAR HARDSHIP CLAIMS ACT (LUCAS ACT, PUBLIC LAW 657).

Fogarty v. United States (Ct. of Appeals), 176 Fed. 2nd 599.

Section 307 of Executive Order 9786 (11 F. R. 11553).

Stephens-Brown, Inc. v. United States, 81 Fed. Supp. 969 (W. D. Mo.).

Warner Construction Co. v. Krug, 80 Fed. Supp. 81 (D. D. C.).

Howard Industries, Inc. v. United States, Court of Claims No. 48874 decided April 4, 1949.

United States ex rel. Tungsten Reef Mines v. Ickes, 84 Fed. 2nd, 257 (Appeals D. C.).

Crimora Manganese Corporation, et al. v. Wilbur, 47 Fed. 2nd 417, 421 (Appeals D. C.), cer. d. 283 U. S. 861.

Marshall v. Wilbur, 47 Fed. 2nd 421.

Milwaukee Engineering & Shipbuilding Co., Navy Department War Contracts Relief Board, December 9, 1947, Government Contracts Reporter, 4 C. C. F., Par. 60,452.

II.

SECTIONS 204 AND 307 OF EXECUTIVE ORDER 9786, PRESUMABLY PROMULGATED PURSUANT TO PUBLIC LAW 657, 79TH CONGRESS, AUGUST 7, 1946, ARE INDIRECT CONFLICT WITH THE PROVISIONS OF PUBLIC LAW 657 AND ARE THEREFORE INVALID AND CANNOT BE INVOKED AGAINST THE PETITIONER.

Section 204, Executive Order 9786 (11 F. R. 11553).

Act of August 7, 1946, Public Law 657, 79th Congress, 2nd Session, 41 U. S. C. 106 note, 60 Stat. 902, S. 1477.

Section 2(a)

Section 3

American Jurisprudence, Vol. 50, Page 204, par. 225.

Browder v. The United States, 312 U. S. 335, 85 L. Ed. 862.

Walker v. United States, 83 Fed. 2nd 103.

Osaka Shosen Kaisha Lines v. United States, 300 U. S. 98; 81 L. Ed. 532; 57 S. Ct. 356.

Union Trust Co. of Rochester v. United States, 5 Fed. Supp. 259 (W. D. N. Y.); Aff'd 70 Fed. 2nd 629; cert. d. 293 U. S. 564.

Manhattan General Equipment Company v. Commissioner, 297 U. S. 129; 80 L. Ed. 528.

Goldsborough v. United States, 80 Fed. Cases No. 5519.

Deming v. M. C. Claughey, 113 Fed. 639, aff'd 186 U. S. 49, 186 L. Ed. 1049.

Houghton v. Payne, 194 U. S. 88, 48 L. Ed. 888.

Smith v. Payne, 194 U. S. 104, 48 L. Ed. 893.

Harris v. Bell, 254 U. S. 103, 103 L. Ed. 159.

People ex rel. Chadwick v. Sergel, 269 Ill. 219, 110 N. E. 124.

United States v. George S. Bush & Co., 310 U. S. 371, 84 L. Ed. 1259.

Neuberger v. Commissioner, 311 U. S. 83, 85 L. Ed. 58.

Work v. Rives, 267 U. S. 175, 69 L. Ed. 561.

Grover v. Merritt Development Co., 47 Fed. Supp. 309 (D. Minn.).

Hamilton v. Dillin, 82 U. S. 528, 21 Wall. 73.

Corpus Juris, Vol. 59, Page 952.

Merritt v. Welsh, 104 U. S. 694, 26 L. Ed. 896.

House Report 2576, 79th Congress, 2nd Session on S. 1477.

U. S. v. Blair, 321 U. S. 730; 88 L. Ed. 1039.

Interstate Natural Gas Co. v. Federal Power Commission, 156 Fed. 2nd 949, 952, aff'd 331 U. S. 682; 91 L. Ed. 1742.

Senate Report 1559, 80th Congress, 2nd Session.

Warner Construction Co. v. Krug, 80 Fed. Supp. 81 (D. D. C.).

Stephens-Brown, Inc. v. United States, 81 Fed. Supp. 969 (W. D. Mo.).

Hearings before a Committee of the Judiciary, United States Senate 79th Congress, 2nd Session on S. 1477.

First War Powers Act, 1941, Sec. 201, 55 Stat. 838-41, 50 U. S. C. App. 611.

Border Pipe Line Co. v. Federal Power Commission, 171 Fed. 2nd 149, 152.

Zazore v. United States, 162 Fed. 2nd 443.

Justice Jackson in 34 American Bar Assn. Journal 535.

Act of June 25, 1948 amend Sec. 6 of P. L. 657; P. L. 773, 80 Cong., 2nd Sess.; 62 Stat. 869, Sec. 37.

III.

**THE SETTLEMENT AGREEMENT OF FEBRUARY 20, 1945 IS NO
BAR TO PETITIONER'S CLAIM UNDER PUBLIC LAW 657.**

Warner Construction Co. v. Krug, 80 Fed. Supp. 81 (D. D. C.).

Illinois Surety Co. v. United States, 240 U. S. 214; 60 L. Ed. 609.

First War Powers Act, 1941, Sec. 201, 55 Stat. 838-41; 50 U. S. C. App. 611.

Executive Order 9001 (6 F. R. 6787).

Contract Settlement Act of 1944, 58 Stat. 649; 41 U. S. C. 101-125.

Webster's 20th Cent. Diet. unabridged (Devlin, 1937), 1519—"settle".

Coleman v. Ferrar, 112 Mo. 54; 20 S. W. 441.

United Concrete Form Products Company, Inc. Commerce Clearing House 4 C. C. F. Par. 60,449.

Black, Dictionary of Law (1891), 1087—"settlement".

Howard Industries v. United States, Court of Claims No. 48874.

Navy Procurement Directive, July 7, 1943, Commerce Clearing House, Government Contracts Reporter, Vol 1, p. 2272.

Bankruptcy Act, Sec. 27 (U. S. C., Title 11, Chapter 4, Section 50).

Collier on Bankruptcy, 14th Ed., Vol. 2, Pp. 1082, 1090.

Sobod, Inc., 25 Fed. Supp. 344.

Stewart et al., In re National Artificial Silk Co., 272 F. 938 (C. A. 6th Cir.).

Lefor v. Jones, 338 Ill. A. 173; 87 N. E. 2nd 48.

Hodgson v. Vroom, 266 F. 267.

IV.

**RECENT CONGRESSIONAL ACTION CLEARLY INDICATES THAT
THE OPINIONS OF THE COURTS BELOW, FROM WHICH THIS
APPEAL IS TAKEN, ARE ERRONEOUS AS BEING BASED UPON
A MISINTERPRETATION OF PUBLIC LAW 657.**

Senate Report, Calendar No. 1612, Report No. 1632, 81st Congress, 2nd Session.

House, Doc. No. 629, 81st Congress, 2nd Session, Cong. Rec. Vol. 96 No. 129, page 9745.

Senate, Doc. No. 203, 81st Congress, 2nd Session, Cong. Rec. Vol. 96 No. 165, page 13143.

Cong. Rec. Vol. 96, No. 147, page 11224, July 26, 1950, on S. 3906.

Cong. Rec. Vol. 96, No. 113, page 8406.

House Report No. 422, 81st Congress, 1st Session, *re:* H. R. 3436.

House Report No. 2704, July 20, 1950, 81st Congress, 2nd Session.

ARGUMENT.

I.

THE PETITIONER'S CLAIM (REC. PAGES 32, 33) CONTAINS A PROPER WRITTEN REQUEST FOR RELIEF PURSUANT TO THE REQUIREMENTS OF THE WAR HARSHSHIP CLAIMS ACT (LUCAS ACT, PUBLIC LAW 657).

The statute under consideration is popularly known as the Lucas Act, Public Law 657, 79th Congress and is entitled "An Act to Authorize Relief in Certain Cases where Work, Supplies, or Services have been Furnished for the Government under Contracts During the War."

The Act is brief and is set forth in full in the Appendix at Page A mere reading of the language of the Act, and that especially set forth in Section 3 thereof, and Sections 204 and 307 of Executive Order 9786, will indicate contradictions between the Act and the portions of the Executive Order referred to, with respect to what constitutes a "written request for relief".

The District Court and the Court of Appeals for the Eighth Circuit contend that the plaintiff is not entitled to relief under this Act by reason of the fact that the plaintiff had not filed a written request for relief from losses *within the meaning of the Act.*

The opinions of said Courts do not contend that the plaintiff filed no written request for relief whatsoever. The opinion of the District Court merely sets forth that "It is not sufficient that a request for some sort of relief was filed. A request for relief from a loss must definitely be a request for an amendment to a contract without consideration under the First War Powers Act" (Record, page 19). In the prior paragraph of the Court's opinion,

the District Court expressed this interpretation of the Act: "Congress under the Act of August 7, 1946 intended to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945" (Record, page 19). The Court of Appeals is of the same opinion. This is indicated in 176 Fed. 2nd 599, at page 601 (Record, page 40) wherein the Court of Appeals holds:

"For, if, as we hold, appellant never on or before August 14, 1945, filed a written request for relief under the First War Powers Act, 50 U. S. C. A. Appendix, Par. 601 *et seq.*, it follows that there was never "a previous settlement" (sec. 3 of the Act of August 7, 1946) of such a claim; and the validity of that part of paragraph 204 of Executive Order 9786 providing that no claim under the Act shall be considered if final action with respect thereto had been taken on or before August 14, 1945, is not involved in the present case."

The above statement of the law is violently opposed to the interpretations of the Lucas Act contended for by this petitioner and the opinions of other Courts, which opinions we shall call to the Court's attention, and the recently expressed opinions of Congress itself to which reference is made under Point IV. The Court of Appeals in this case insists that the Lucas Act is a mere extension of the First War Powers Act, 1941; other Courts and the recent pronouncements of Congress (set out under Point IV of this Brief) establish that the Lucas Act is remedial legislation wholly independent of the First War Powers Act, 1941 and is intended to go far beyond the relief granted by the First War Powers Act, 1941.

Prior to the enactment of the Lucas Act there was no right whatsoever to reimbursement by either a contractor or a subcontractor for losses sustained unless the contract that was entered into so provided. Section 201 of the First

War Powers Act authorized amendments or modifications of contracts where the President deemed such amendments or modifications "would facilitate the prosecution of the War."

The Act under consideration here clearly states that its purpose is based upon other principles. The rights of a claimant under the Lucas Act is afforded him on the theory that where Government contracts are performed by a contractor without fault or negligence on his part and he sustains a loss in the performance thereof, that our Government, as a matter of equity and fair dealing, has determined that he will be reimbursed for such losses.

The Courts below, in these proceedings, apparently must have considered the Regulations promulgated by the President (Executive Order 9786) and not the language of the Act itself. This conclusion is based upon the fact that Section 3 of the Act contains no such language limiting claimants to First War Powers Act relief, but that Sections 204 and 307 of Executive Order 9786 does tend to contain such limitations which are not a part of the Act. Section 307 of Executive Order 9786 provides in part that a loss claimed shall not be granted under the Act unless "such other war agency finds that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945." It is, therefore, only by virtue of the language of the Regulations and not the language contained in the Act itself that justifies the conclusions in the opinions of the District Court and the Court of Appeals for the Eighth Circuit. The material variance between the Act and the regulations referred to is condemned by the Courts in the following cases:

Stephens-Brown, Inc. v. United States, 81 Fed. Supp. 969.

Warner Construction Co. v. Krug, et al.; 80 Fed. Supp. 81.

Howard Industries, Inc. v. United States, Court of Claims No. 48874.

and in recent expressions of Congress itself, which are discussed under Point IV of this Brief.

There is no precise form prescribed by Congress and there is no specific requirement in the Act itself as to what constitutes a request for relief. The decisions cited in the memorandum of the District Court have no application to the Act under consideration by reason of the fact that they concern themselves with acts of a different character wherein certain *jurisdictional* requirements were lacking.

The case of *United States ex rel. Tungsten Reef Mines Co. v. Ickes*, 84 Fed. 2nd 257 (Appeals D. C.) (Printed Record, page 20) referred to in the District Court memorandum is definitely not in point. At page 260 of the case the court says, "And so here the consent order that was entered, being beyond the court's jurisdiction, was a nullity. The defect was not formal or modal. It was jurisdictional. It was indispensable in the circumstances, that jurisdiction should be shown, for until it was shown there was nothing on which the court could act."

The case of *Crimora Manganese Corporation, et al. v. Wilbur*, 47 F. 2nd 417, 421 (Appeal D. C.) cer. d. 283 U. S. 861 (Record, page 20) referred to by the District Judge as additional authority states at page 421 thereof: "It may be added that the petition though replete with general allegations of 'stimulation' by the 'war-time agencies of the United States' nowhere names as the stimulator any one of the five agencies specified by the statute. This alone would seem to render the petition defective."

A reading of the case would indicate that one of the questions involved dealt with a charge by the plaintiff

that it was coerced into doing certain things (the specific word used in the Complaint was 'stimulated') by one of the agencies of the Government and the court held that failing to name one of the five agencies specified by the statute would render the petition defective. So that we can readily see that the objection to the pleading was that the FACTS were not sufficiently set forth.

The case of *Marshall v. Wilbur*, 47 Fed. 2nd 421 (Printed Record, page 20) cited by the District Court, is to the same effect as the previous case, which contended for losses sustained by "stimulation" by the request, demand, solicitation and appeal of the United States of America and its agencies which urged and "stimulated" and the Complaint nowhere mentions any one of the five agencies named in the statute.

In the instant proceedings, the jurisdictional requirements contained in Section 6 of the Act set forth no jurisdictional requirements other than the claimant shall have the right within six months to file a petition with any Federal District Court of competent jurisdiction seeking a determination by the court of the equities involved.

Was there a written request for relief filed? The original claim involved in these proceedings (which is the original of Item 1 of the Designation of Record, on file with the Clerk of this Court, Record, pages 32 and 33) contains many forms of specific requests for relief. There are numerous invoices attached to said claim, all of which are itemized and specific as to their content. There is attached to said claim a document entitled "In the Matter of the Claim for Compensation of Edward L. Fogarty, Trustee of Inland Waterways, Inc." filed with the Claims Unit, Navy Audit Section, Bureau of Supplies and Accounts, Navy Department, entitled "Petition Requisition #120" dated the 23rd day of July, 1943, and a very detailed and extensive document

served personally on Commander Bergman of the U. S. Navy on May 17, 1944, and also sent to the Bureau of Supplies and Accounts of the United States Navy and the United States Attorney's office on May 17, 1944, which document set forth the claim of the Trustee, Edward L. Fogarty, against the Navy Department, Bureau of Supplies and Accounts (Rec. 32, 33), which is a definite request for relief and which was also filed in the District Court of the United States for the District of Minnesota, 5th Division, on May 18, 1944.

There is, therefore, no question but that a written request for relief, and in fact many written requests for relief, were filed with "the agency or department concerned" prior to August 14, 1945, and all were made a part of the claim so filed.

The Navy Department War Contracts Relief Board has often conceded that the precise form of a request for relief was not prescribed by Congress and that the exact wording is immaterial. This is evident from the typical decision of that Governmental Agency in *Milwaukee Engineering & Shipbuilding Co.*, Navy Department War Contracts Relief Board, December 9, 1947, Government Contracts Reporter, 4 C. C. F., Par. 60,452, wherein the Board states in part "The Board agrees with the claimant that the precise form of such a request was not prescribed by Congress, and the exact wording is immaterial."

The decision of the Court of Appeals, however (in line with the reasoning of the President, as evidenced by his regulations) to the effect that Congress intended to limit consideration to a request for relief from laws under the First War Powers Act, has no basis in fact and nowhere in the Act is there any language by which such a conclusion can be gleaned, and is against the expressed intention of Congress in passing the Lucas Act. (See Point IV of this Brief.)

An examination of the claim that was filed with the District Court on April 2, 1948 (Record, pages 32 and 33), setting forth the counterclaim of the trustee to the claim of the Government in the bankruptcy proceedings and the numerous billings and other exhibits attached to said claim, clearly indicate that *numerous* requests for relief were filed prior to August 14, 1945. The amount which may be due to the claimant is, of course, restricted to the amount which might have been allowed by the department or agency concerned and can only be determined after a hearing of this cause on its merits.

The Court of Claims in *Howard Industries, Inc. v. U.S.*, Court of Claims No. 48874 at page 10 of its decision, sets forth its conclusions in this connection as follows:

"The requirement contained in Section 3 of the Lucas Act that claimants must have filed a written request for relief prior to August 14, 1945, merely means, we think, that claimants must be able to show that they had made timely (that is, prior to August 14, 1945) protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims. This the plaintiff has done by three letters referred to earlier in this decision."

II.

SECTIONS 204 AND 307 OF EXECUTIVE ORDER 9786, PRESUMABLY PROMULGATED PURSUANT TO PUBLIC LAW 657, 79TH CONGRESS, AUGUST 7, 1946, ARE IN DIRECT CONFLICT WITH THE PROVISIONS OF PUBLIC LAW 657 AND ARE THEREFORE INVALID AND CANNOT BE INVOKED AGAINST THE PETITIONER.

The recent expressions of Congress set out under Point IV of this Brief are proof of the fact that Sections 204 and 307 of Executive Order 9786 are contradictory to the intent and stated purpose of the Lucas Act. Our analysis

here, however, is made for the purpose of directly responding to the arguments heretofore made by the proponents of the propriety of the said Executive Order.

Section 204 of Executive Order 9786 reads as follows:

"No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date." (Italics ours.)

Section 2(a) of the Act provides in part that the Board, in arriving at a fair and equitable settlement of claims under this Act:

"• • • shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation Act (50 U. S. C. Supp. IV, App. Sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C. Supp. IV, Sec. 101-125), or similar legislation; (2) relief granted under Section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act." (Italics ours.)

This Section of the Act is followed by Section 3 which provides in part:

"• • • but a previous settlement under the First War Powers Act, 1941 or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act."

The language of the Act in the two sections above quoted is clear and explicit. There is no ambiguity contained in the language thereof.

After reading Section 2(a) and 3 of the Act, we come to the consideration of the force and effect, if any, of Section 204 of Executive Order 9786. The language therein

contained "and no claim shall be considered if final action with respect thereto was taken on or before that date" (August 14, 1945) is clearly and diametrically opposed to the plain and explicit language of the Act above referred to.

The District Court referred to certain portions of committee sessions in the Senate and statements made in the Congressional Record which concern themselves in part with one of the purposes of the Act. The Act by its plain language does not and was not intended to limit the scope of the Act to an extension of the First War Powers Act, 1941. The statute under consideration by the court does not state that it is an extension of the First War Powers Act, 1941. And when the language of Section 3 of the Act is read, providing that a previous settlement shall not operate to preclude further relief, the inconsistency of Section 204 of Executive Order 9786 becomes all the more apparent.

The District Court and the Court of Appeals in these proceedings have held the Executive Order complained of, as being properly promulgated, by a resort to legislative history of the Lucas Act as an aid for the construction of that Act. These Courts ignore the plain and unambiguous language of the statute itself and look to extraneous sources to justify their conclusions.

The District Court and the Court of Appeals have sought to apply rules of construction to a clear and unambiguous act which is not subject to the type of statutory interpretation that we find in statutes which are not so clear and explicit, so as to justify the Executive Orders under discussion. The Courts consider those latter statutes ambiguous and, therefore, look to sources other than the language therein contained in order to ascertain the meaning thereof.

We can find no clearer or simpler statement of the law

than is found in '50 American Jurisprudence at page 204, reading from Paragraph 225:

"A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning. In the case of such unambiguity, it is the established policy of the courts to regard the statute as meaning what it says, and to avoid giving it any other construction than that which its words demand. The plain and obvious meaning of the language used is not only the safest guide to follow in construing it, but it has been presumed conclusively that the clear and explicit terms of a statute expresses the legislative intention, so that such plain and obvious provisions must control. A plain and unambiguous statute is to be applied, and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity."

The above statement of the law is supported by numerous decisions both state and federal, and, typical of the holding of the cases in support of the contention, we refer the court to the case of *Browder v. The United States*, 312 U. S. 335, holding in essence that no single argument has more weight in statutory interpretation than a construction within the plain meaning of the words of the statute. To the same effect is the case of *Walker v. United States*, 83 Fed. 2d, page 103, in which the court said at page 106:

"The determination of the construction of the meaning of congressional acts is a judicial function.

This function and duty is so entirely and purely judicial that it is beyond the power either of the executive (citing cases) to control.

"If the statutory meaning is clear, there is no place for rules which aid in ascertaining the meaning of the statute, and neither legislative nor executive construction nor both is of any aid or force. (Citing cases.)"

To the same effect is the case of *Osaka Shosen Kaisha Lines v. United States*, 300 U. S. 98, 81 L. Ed. 532, 57 S. Ct., 356 and the cases cited therein.

The District Court sustained by the Court of Appeals, nevertheless, seeks to narrow the purpose and intendments of the Act to the relief to be granted to the small group of contractors who had claims pending under Section 201 of the First War Powers Act of 1941 that were undetermined as of August 14, 1945. That this is a clear misconception of the purpose of the Act is made more apparent in the light of recent Congressional action referred to under Point IV of this Brief.

The rule of construction of unambiguous statutes as set forth in 50 American Jurisprudence, as hereinabove set forth, does not afford one the luxury of dwelling upon certain words or phrases that they can pluck here and there from the lips of individual legislators and thereby apply a narrow meaning for what was merely intended to be a discussion of one small part of the scope and purpose of particular legislation in an attempt to encompass the whole of the legislative will within the narrow confines of such expressions.

We have never encountered in all of our reading of law a regulation which so clearly is diametrically opposed to the plain language and intendments of a statute than we find in Sections 204 and 307 of Executive Order 9786.

There are many cases which hold that a regulation has no force when it is in conflict with the statute but we need

eite only two typical decisions to bring out an obvious rule of law. The case of *Union Trust Co. of Rochester v. United States*, 5 Fed. Supp. 259 was decided in the District Court of the Western District of New York on October 3, 1933 and affirmed by the Circuit Court of Appeals on April 2, 1934 in a decision in 70 Fed. 2nd 629. The petition for certiorari was denied by the Supreme Court of the United States in 293 U. S. 564. At page 261 of the case cited in the 5 Fed. Supp., the court states:

"It is the contention of the Government that a regulation promulgated by the Internal Revenue Commissioner has the force of statute and limits recovery to that portion of the tax paid within 4 years preceding the filing of the claim * * *. The Commissioner of Internal Revenue was authorized to adopt the regulation to carry out these provisions of the Revenue Act. A regulation so adopted may have the force of statute. *It is self-evident that it has no such force when in conflict with statute.*" (Italics ours.)

To the same effect is *Manhattan General Equipment Company v. Commissioner*, 297 U. S. 129 at pages 134 and 135.

Goldsborough v. United States, 89 Federal Cases #5519; *Deming v. M. C. Claysbury*, 113 Federal 639, affirmed 186 U. S. 49; *Houghton v. Payne*, 194 U. S. 88 followed in *Smith v. Payne*, 194 U. S. 104; *Harris v. Bell*, 254 U. S. 103; *People ex rel. Chadwick v. Sergel*, 269 Ill. 219, 110 N. E. 124 and numerous other decisions, all hold that the erroneous conception of an executive department or agency as to the construction of a statute to whom Congress has entrusted its execution cannot bind the courts; that a court cannot lawfully renounce its judicial powers; and it is its duty to render a decision contrary to the construction and practice of the department or agency if satisfied that a correct determination of the question before it requires

such a contrary decision. We ask no more than that the court examine Sections 204 and 307 of Executive Order 9786 to determine whether or not said regulations, which were supposedly promulgated to carry out the purposes of Public Law 657, are not in direct conflict with the provisions of said Act as set forth in Sections 2(a) and 3 thereof. Briefly, the Act provides that relief granted irrespective of whether or not a previous settlement was made with the claimant on or before August 14, 1945. Section 204 of the Executive Order is in direct conflict in that it provides that no claim shall be considered if final action with respect thereto was taken on or before August 14, 1945. We do not quarrel with the argument that the Act authorized the President to promulgate regulations to implement the statute, but we must examine and inquire into the regulations promulgated in the light of the particular statute under consideration.

Certainly under the statute before the court the President would have the right to promulgate regulations which would provide for the manner, form and time for the filing of claims and other administrative rules and regulations with reference to the presentation of the claims. Nowhere in this Act is there any authorization giving the President or the board legislative powers. The authority referred to by the District Court in its memorandum such as *United States v. George S. Bush & Co.*, 310 U. S. 371 (Record, page 23) is ample authority for the contention we have just made because in that case the Act specifically gave the President absolute discretionary power. That case involved the Tariff Act of 1930. The Act provided in Paragraph 336 (e) that the President "shall by proclamation approve the rates of duty and charges in classification and in basis of value specified in any report of the commission under this section, and if in his judgment * * *," (Italics ours.)

The said Tariff Act gave the President absolute discretionary power and it is set out on page 380 of the decision above referred to:

"Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive charge of the existence of those facts."

So we see that the Tariff Act of 1930 grants unto the President the right to make determinations *solely upon "his judgment"*. The Act under consideration before us is not even remotely that type of legislation. Nowhere in the Act does Congress delegate any of its legislative functions to the President. The President only has the power to make regulations for the purpose of the orderly processing of the claims. That is clear from the language in the first section of the Act "Such departments and agencies are hereby authorized, in accordance with the regulations to be prescribed by the President within sixty days after the approval of this Act, to consider, adjust, and settle equitable claims of contractors, * * *."

The President cannot narrow the scope of a statute when Congress plainly has intended otherwise. *Newberger v. Commissioner*, 311 U. S. 83.

The case of *Work v. Rives*, 267 U. S. 175 cited by the District Court (Printed Record, page 21) states at page 182 thereof "It (the Act) vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. Final against whom? Against the claimant. He could not resort to court to review the Secretary's decision. This was expressly forbidden." In our case the contrary is true. The Act expressly provides for review by appeal to the courts. The case cited by the District

Court of *Grover v. Merritt Development Co.*, 47 Fed. Supp. 309 (Printed Record, page 21) sets forth on page 311 that the Act provided "*That the decision of the Secretary shall be conclusive and final.*" No such power is granted to the President or administrative body under our Act. We agree with the conclusion of the District Court that the discretion in issuing regulations depends to ~~some~~ extent on the subject matter and we agree with the citation in support of that proposition, *Hamilton v. Dillin*, found in 82 U. S. 528, 21 Wall. 73 (Record, page 24). But in that case the *statute* provided (page 92) "The President may, in his discretion, license and permit commercial contracts * * * in such articles, and for such time, and by such persons as he, in his discretion * * *" (Italics ours). "The extensive effect given to these clauses is undoubtedly largely due to the character of the instrument and that of the donee of the powers, to-wit: The legislature of the United States * * *." So we see that in that case there was unlimited discretion expressly granted to the President and that the legislator of the United States say fit in that legislation to grant powers for which no comparable language can be found in the Act now before the court for consideration. It is not possible to compare the statute here before the court with the one under consideration in *Work v. Rives*, 267 U. S. 175 because as we have set forth in the quotation from the case at page 182, the Act in that proceeding made the Secretary's decision conclusive and final. There was no resort to the courts for review. "This was expressly forbidden." This is surely a far cry from the statute we have before us which allows appeal to any Federal Court of competent jurisdiction to enter an order directing the department of agency to settle the claim in accordance with the finding of the court.

59 Corpus Juris, page 252, states the law to be:

"The intention of the legislature is to be obtained

primarily from the language used in the statute. The court must impartially and without bias review the written words of the Act being aided in interpretation by the canons of construction. Where the language of a statute is plain and unambiguous there is no occasion for construction even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislator, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it because of some supposed policy of the law, or because the legislator did not use proper words to express its meaning, or the court would be assuming legislative authority."

This principle is well established and in a typical opinion the Court held in *Merritt v. Welsh*, 104 U. S. 694 at page 702:

"Whatever may have been in the minds of individual members of Congress, the legislative intent is to be sought first from the words they have used. If these are clear, we need go no further."

The District Court and the Circuit Court of Appeals for the Eighth Circuit have held that the Act limits recovery to First War Powers Act standards. The only reference to the First War Powers Act that stands by itself is a statement in the first paragraph of the Act that the work, etc. should have been furnished to a department or agency *which had been authorized to enter into contracts* and under Section 201 of the First War Powers Act. No issue is raised in this case that the contract of the petitioner with the Government is not within that class. The contract of the petitioner with the Government upon which claim was filed before the Board and which is here pending before the Court meets the requirements of that section of the

Act. The regulations, however, are not content with carrying out the express provisions of the Act in accordance with the language therein contained, but they seek to construe a statute where the statute itself, by reason of its unambiguity, is not subject to construction. The District Court and the Circuit Court of Appeals seem insistent that the Act before the Court is nothing more than an extension of the First War Powers Act and in justification of their position and interpretation insist that their conclusion is the only one tenable because they read the Act "in the light of its legislative background". (Italics ours.)

The language of all the courts is strong with regard to the rules regarding construction of statutes, and in each case it is the clear and unmistakable rule of law that the language of the Act itself must be followed by the courts where the statute is clear, uncontradictory and contains no ambiguities. Certainly, the courts below do not contend that the statute before the court for consideration is not clear, certain or unambiguous.

A reading of the first paragraph of the report the District Court has referred to (Record Page 21, House Report No. 2576, 79th Congress, 2nd Session) will reveal the following language:

"The purpose of this bill is to authorize departments and agencies of the Government, in accordance with regulations to be prescribed by the President within 60 days after the date of approval of this act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses incurred between December 7, 1941 (later changed to Sept. 16, 1940) and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontract[s]." (Italics ours.)

It is significant to note that the date of December 7, 1941 above stated was changed to September 16, 1940, thus enlarging the relief to be granted.

Of course, the proposed legislation *also* gave relief to those contractors referred to in the next paragraph, but that obviously merely refers to only one particular group of aggrieved *contractors*.

The *purpose* as expressed in the first paragraph and the Act itself includes "*subcontractors and materialmen performing work or furnishing supplies or services to the Contractor or another subcontractor*."

If rights were limited to those under the First War Powers Act these subcontractors or materialmen never could make a claim by virtue of the simple fact that there was no privity of contract with the Government and in fact, an attempt of a subcontractor or materialman to make a claim would be denied on that simple ground—lack of privity. *U. S. v. Blair, et al.*, 321 U. S. 730.

The First War Powers Act did not deal with the rights of subcontractors or materialmen to make a claim against the Government. The *expressed purpose* of Public Law 657 must be also construed in conjunction with the rights of those who are *expressly* to be benefited thereby—*subcontractors and materialmen*. Reliance of the District Court solely upon the next paragraph which concerns itself with "*contractors*" *only* would negative the first paragraph. This obviously was never intended.

Again, we respectfully call the court's attention to the fact that discussions before committees dealing with legislation initially proposed (but never enacted) and which emerges into a totally different piece of legislation, cannot be considered in the construction of the final enactment.

"Certainly the legislative history of a bill that was

not adopted cannot be resorted to to construe a bill that was."

Interstate Natural Gas Co. v. Federal Power Commission, 156 Fed. 2nd 949, 952, affirmed 331 U. S. 682.

If we are to seek legislative interpretation we most certainly cannot ignore the committee on the Judiciary of the Senate in submitting its formal committee report explanatory of the recent amendment to the Judicial Code (Sec. 37 of P. L. 773, 62 Stat. 869, Appendix, p. ...) at page 14 of the Senate Report, 1559, 80th Congress, 2nd Session, which states the following:

"Public Law 657 of the 79th Congress provides for the determination of war claims incurred without fault or negligence where any form of contract relief had been requested during the war and despite former administrative denial or settlement thereof."

Our contention is adequately supported by the finding of Judge Holtzoff in the case of *Warner Construction Co. v. Krug, et al.*, District Court of the United States for the District of Columbia, 80 Fed. Supp. 81 and also by Judge Albert L. Reeves in the case of *Stephens Brown, Inc. v. United States*, 81 Fed. Supp. 969, in which case the court stated:

"The contention of the defendant that the claim of May 8, 1944 was denied, and, therefore, under Executive Order 9786 the plaintiff is debarred the right of recovery is untenable. Apparently the Executive Order was prepared in the light of the bill as originally introduced. Paragraph 204 of said Order specifically denies relief where final action with respect to a claim was taken before August 14, 1945. The Executive Order in that regard contravenes the express provisions of the statute which specifically provides, 'but a previous settlement under the First War Powers Act,

1941 or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.''" (Italics ours.)

Judge Holtzoff, in *Warner v. Krug*, above cited, held:

"It is claimed by Government counsel it was the intention of the Congress in passing the Act of August 7, 1946, to do nothing more than continue the authority of Government agencies to settle contracts under the First War Powers Act.

"In support of this contention, Government counsel refers to various statements made by members of Congress on various occasions. Such statements, however, cannot contradict the unambiguous provision of the statute.

"It is important in this connection to note that when the bill was originally introduced it was much more narrow in its scope than the form in which it finally passed, and it may well be that some of the statements to which counsel refers had reference to the legislation in its original form. The bill as originally introduced contained a proviso that it should not be applicable to cases submitted under the First War Powers Act, which had been finally disposed of prior to August 14, 1945, and it is significant to observe that this proviso was stricken from the measure in the course of its passage and instead the provision which now appears as the last clause of Section 3 was inserted, affirmatively providing that a previous settlement under the earlier statute shall not operate to preclude further relief otherwise allowable under the Act.

"This legislative history throws a very significant light on the intent of Congress and accentuates the unambiguous meaning of the last clause of Section 3. It is obvious that it was the intention of Congress that a prior settlement under the earlier statute should not operate to preclude the granting of further relief under the 1946 Act.

"With the policy or expediency of this legislation, the Court has no concern. It is the duty of the Court

to enforce the statute as it is written, especially in view of the fact that it is unambiguous.

"In so far as Sections 204 or 307 of the rules and regulations promulgated under the statute may be inconsistent with Section 3 of the Act, these regulations must be deemed invalid, because it is elementary law that executive regulations promulgated for the purpose of carrying the statute into effect must be within the framework of the statute and may not be inconsistent with the statute."

"On the basis of these considerations, the motion of the defendant for summary judgment will be denied."

The question of legislative intent as discussed by the District Court in these proceedings, however, is clearly erroneous even if the rule of law were contrary to that which we have contended for. The statements of the trial court as to the legislative history which led the court to believe that the purpose of the Lucas Act as finally enacted was to do no more than extend the First War Powers Act are not accurate when a complete analysis is made of that legislative history.

An analysis of the record will indicate that when Senator Lucas *originally* introduced his bill, it apparently was little more than an amendment to Section 201 of the First War Powers Act. The same can be found set forth on page 1 of the Hearings on the War Contract Hardship Claims Act before a Committee of the Judiciary, United States Senate, 79th Congress, 2nd Session on S. 1477.

The bill as originally introduced read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may authorize any department or agency of the Government (which prior to August 14, 1945, was authorized to enter into contracts and into amendments or modifications of contracts under section 201 of the First War Powers

Act, 1941), in accordance with regulations prescribed by the President, to enter into contracts and into amendments or modifications of contracts, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts, whenever the head of such department or agency makes a determination that such action is necessary to prevent a manifest injustice to a firm, corporation, or individual who has furnished supplies or services for the Government; Provided, That action taken pursuant to this section shall be confined to cases where such supplies or services have been so furnished between December 7, 1941 and August 14, 1945; and action may be taken under this section in such cases whether or not such supplies or services were furnished under a contract which has been completed and upon which final payment has been made; Provided further, That this section shall not be applicable to cases submitted under section 201 of the First War Powers Act, 1941, which have been finally disposed of under such section upon their merits prior to August 14, 1945. All Acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

"Sec. 2. No action shall be taken under this Act except with respect to claims or requests for action thereunder submitted to the department or agency of the Government concerned prior to July 1, 1946."

When that Act is compared with Section 201 of the First War Powers Act it will be noted that the only material difference in the language of the two Acts is that the words "facilitate the prosecution of the war" as used in Section 201 of the First War Powers Act are changed in Senate bill S. 1477, as *originally* introduced, to read "prevent a manifest injustice." By such a change, the objection of the War Department that hostilities had ceased and that no modification of the contract would aid the

further prosecution of a war that had ended was intended to be met so that relief would be granted, not upon the basis that such relief would facilitate the prosecution of the war, but upon the basis that such relief would prevent manifest injustice.

The legislative history of this Bill did not, however, stop at that point. That was only the beginning of the effort of Congress to provide relief for contractors who had suffered losses in the performance of contracts in aid of the war effort. Following the introduction of the original Bill an extended hearing was held, lasting two days. (Hearings before a Sub-Committee of the Committee on the Judiciary United States Senate, Seventy-Ninth Congress, Second Session, on S. 1477, April 12 and 13, 1946), by a sub-committee of the committee on the judiciary of the Senate. In the course of that hearing many claimants appeared and presented their views; high officials of the Army, Navy, Maritime Commission, General Accounting Office and others appeared.

The variety of claims presented to the Committee and the differences of view expressed by those appearing before the Committee soon became manifest. One of the matters which provoked comment was the phrase "prevent manifest injustice" as used in the Bill originally introduced. Mr. Frank H. Weitzel, representing the General Accounting Office, appeared before the Committee and described that phrase as very vague and indefinite. The colloquy during his appearance before the Committee, beginning at page 27 of the Report is enlightening. We quote part of the statement of Mr. Weitzel on page 28 as follows:

"Mr. Weitzel: I would question whether in one or two of the situations presented by Senator Lucas, the relief would be forthcoming if this bill should be enacted. There was some dispute in the War Depart-

inent in the case of the Hanover Woolen Co., and even when they had the opportunity to grant relief under the First War Powers Act, the Department decided not to grant that relief. And I would say, and I do not think anyone could say that the Department necessarily would grant relief in a case of that sort, even under this bill.

"As to the case of the Lake States Engineering Co., that is a construction contract, apparently, and the language of this bill says that the injustice must be to a firm, corporation or individual who has furnished supplies or services for the Government. In this respect, the language might not be broad enough to cover certain cases such as these construction contracts. I think the third case he mentioned, also, was a construction contract, which might be just as meritorious as those reached by the present language of the bill.

"If it is the intent to cover such contracts as construction contracts, the language should be clarified."

"In that connection, we might call attention to the fact that the First War Powers Act was not enacted as an aid to contractors. It was enacted as an aid to the prosecution of the war, and I note with interest that the War Department had taken the position that the relief granted must be essential to the prosecution of the war.

"In other words, if paying more under a contract to a contractor who had no further contracts with the Government were requested, the Department would feel that that was not an aid to the prosecution of the war. So, of course, this provision that you now have is much broader, in that the same action can now be taken if necessary to prevent a manifest injustice.

"The Chairman: That is an injustice to one who was called in to render a certain measure of service in furtherance of the war effort?

"Mr. Weitzel: Yes, Senator.

"Senator Revercomb: May I interrupt there to say that I would not want to limit this in furtherance

of the war, if the Government went into a contract under authority of law, and through no fault of the contractor he lost money whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?

"If you hang it upon the question of furtherance of the war, you have put into it another element that may be difficult to prove.

"Mr. Weitzel: I think, too, if you give effect to the provisions of *this bill, you will exclude many cases which might be thought meritorious by the contractors, but which were decided adversely to the contractors* for this very reason, that the department thought that action would not be in furtherance of the war effort. Even though it might help the contractor and pull him out of bankruptcy, if it was not in furtherance of the war effort, the relief would not have been granted and *it could not be granted under this bill.*

"Senator Revercomb: *Where is the justice in making a distinction in a contract on the ground it is in furtherance of the war-effort, if it is a contract entered into in a bona fide way?*

"Mr. Weitzel: I am not sure that there should be a distinction. I think that there was a distinction *during the war*, because of the fact that the contractor, if he kept in business and furnishing material to the Government, could help the war effort. That was the approach under the First War Powers Act. That may not be the *intended* approach under this bill, *but the language of the bill has that limitation*, that if a case was settled under the First War Powers Act, it could not be reopened now.

* * * * *

"The authority proposed to be granted by the bill would extend to numerous departments and agencies of the Government, and it may be felt by the committee that a better approach would be to authorize the presentation of claims for losses to a designated agency or tribunal for settlement upon an equitable

basis, and Senator, that need not be limited to claims for losses incurred in furtherance of the war effort; that would be a question of policy for the committee to decide upon. The primary thing, though, is that a specific tribunal such as the Court of Claims would be given the authority in the legislation to hear and pass upon equitable claims of contractors for losses incurred during the war period on contracts with the Government.” (Committee Report 27, 28, 29.)

On the second day of the hearing before the subcommittee the Chairman, at page 39, of the Report, stated:

“I am just guessing at this thing as I visualize the picture, and I am not trying to decide it, and I do not think it is the province of this chairman to decide it. I am only trying to get the thing straightened out, to see whether or not the language of the Act fits the case. If it does not fit the case, then perhaps we had better get legislation that will fit such a case.

“The Chairman: If, at the time the contractor sustained the loss, he was in the act of assisting in the prosecution of the war or the war effort, that is the spirit in my judgment of the law.

“Mr. Wagner: That is true.

“The Chairman: It may be that the language cuts off the spirit, I do not know. The spirit giveth life, they say, but the letter killeth. That is pretty true in this case.”

So we see in regard to this legislation as is also the fact in many other bills that are introduced, that certain ideas are fostered to accomplish a specific and limited purpose but as the measure progresses in the ordinary channels of legislative discussion and investigation, the original thought is enlarged or modified so that when a final enactment is made, you have a combination of ideas which have been incorporated therein instead of the single thought of

purpose that the legislator who originally introduced the bill, had in mind.

It is obvious that there were certain injustices under the First War Powers Act which were originally sought to be remedied and there would be no hardship on the part of anyone to pick out a phrase here and there from the lips of certain senators or parties testifying before the committee on the hearings, to point out that views were expressed for the purpose of getting the committee to ultimately recommend the type of legislation that the individual proponent had in mind.

We have cited at length portions of the statements made before the committee which would indicate clearly that as the hearings progressed, the purpose and intention of the Act was liberalized so that in the language of the Chairman of the committee at page 44 of the Report "I think that those who meritoriously contributed to the war effort should not be permitted to lose".

A simple analysis of some of the features of the *original* Lucas bill introduced and Lucas Act Public Law 657 which was *ultimately* enacted will indicate the vast and sweeping material changes and modifications that were made between the Act initially proposed and that finally adopted by Congress.

The following are the important differences between the *original* Lucas Act as proposed in S. 1477 (which was never enacted) and S. 1477 which *finally* became Public Law 657:

- (1) The *original bill* S. 1477 (never enacted) contained language which would have some comparison with Section 201 of the First War Powers Act, 1941, which permitted departments or agencies of the Government "to enter into contracts and into amendments or modification of contracts." Section 201 permits such action whenever

the President "deems such action would facilitate the prosecution of the war." The *original bill* S. 1477 (never enacted) permits such action "whenever the head of such department or agency makes a determination that such action is necessary to prevent a manifest injustice"

The language of S. 1477 that was actually enacted as Public Law 657 is, however, entirely inconsistent with the foregoing concepts. Public Law 657 empowers the Government "to consider, adjust and settle equitable claims of contractors, including subcontractors and materialmen—for losses (not including diminution of anticipated profits) incurred without fault or negligence on their part in the performance of such contracts or subcontracts."

(2) The very statutory period stated in Section 1 of Public Law 657, that is, September 16, 1940 to August 14, 1945 is additional proof of the fact that it was not the intention of Congress to limit relief to First War Power claims only. The First War Powers Act, 1941, did not become law until *December 18, 1941*. Thus as to claims which were the result of work, labor or material between September 16, 1940 and December 18, 1941 and losses thereon, no relief could conceivably have been granted under the First War Powers Act, 1941. To interpret Public Law 657 so that claims would be limited to First War Powers Act, 1941 claims, would be to deny the benefits of the Act to persons furnishing work, labor and material during the first fifteen months of the statutory period defined in Public Law 657—that is, September 16, 1940 and December 18, 1941. To persist in the construction sought by the Court of Appeals in limiting relief to First War Powers Act, 1941 claims only, could result in only one thing—a rewriting of the Statute.

The *original bill* S. 1477 (never enacted) by its first proviso was confined to cases where such supplies or serv-

ices had been furnished between December 7, 1941 and August 14, 1945. The First War Powers Act, 1941, and Section 201, covered practically the same period of time specified in the original bill S. 1477 (never enacted).

Public Law 657 enlarged on this period of time so that contractors, subcontractors and materialmen who had completed and who had been paid for the performance of services or the furnishing of supplies between September 16, 1940 and December 7, 1941 would be entitled to relief under Public Law 657, where they would have *no* relief under the First War Powers Act, 1941 or under the provisions of the *original bill S. 1477* (never enacted). This is further conclusive proof that it was intended by Congress in the enactment of Public Law 657 to grant relief to a great number of persons who could neither claim, nor be entitled to, relief under Section 201 of the First War Powers Act, 1941.

(3) Under Section 201 of the First War Powers Act, 1941 governmental departments and agencies were granted power to amend or modify contracts *made with the Government*. The undeviating practice of the Government had been to deal with claims or demands of subcontractors or materialmen on the legal ground of no privity of contract. Prior to the Contract Settlement Act of 1944 subcontractors and materialmen had no standing as claimants against the Government except as afforded them under the Miller Act which required the posting of performance or payment bonds, and which Act is not herein involved by reason of the fact that in the urgency of the war effort the requirements of such bonds were suspended.

The *original bill S. 1477* (never enacted) in line with its seeming purpose merely to amend Section 201 of the First War Powers Act, thus makes no mention of subcontractors or materialmen.

However, the bill S. 1477 finally enacted as Public Law 657 *specifically includes subcontractors and materialmen.* In fact, the minutes of the Hearings before the Senate Subcommittee—and it should be borne in mind that only the provisions of the *original bill* S. 1477 (never enacted) were under consideration at the Hearings—contain a number of instances of subcontractors and materialmen, having no contract privity with the Government, who alleged they had suffered losses in carrying out their contracts, and who under the existing law, rules and procedures of the Government, including Section 201 of the First War Powers Act, 1941, and of the provisions of *original bill* S. 1477 (never enacted), would not have been entitled to relief. These subcontractors and materialmen urged the passage of legislation affording relief to them as well as to prime contractors and statements of their apparently meritorious claims were inserted into the record of the Senate Subcommittee (see Hearings, pp. 9-11, 45-46) of Hearings of the Committee on the Judiciary, 79th Congress, 2nd Session on S. 1477.

The bill S. 1477 finally enacted as Public Law 657, however, explicitly affords relief to subcontractors and materialmen, another clear evidence of the fact that Congress cannot have intended to limit claims only to claims made under the First War Powers Act, 1941.

(4) The *original bill* S. 1477 (never enacted) provided that "this section shall not be applicable to cases submitted under Section 201 of the First War Powers Act, 1941, which have been finally disposed of under such section upon their merits prior to August 14, 1945." Here again, however, the provisions of S. 1477 finally enacted as Public Law 657 are entirely different. *In fact, not only was the above quoted language of the original bill entirely eliminated from the bill which became law, but in its*

place there was substituted a diametrically opposite provision in Section 3 of Public Law 657, i. e., that "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under this Act."

The express reference to the Contract Settlement Act of 1944, unmistakably clear as to meaning and intent, is most significant and fatal to the Government's contention that Public Law 657 was intended to cover only claims made specifically under the First War Powers Act, 1941.

Section 3 of Public Law 657 points out the fundamental weakness in the position of the District Court and the Court of Appeals. Let us consider a subcontractor or materialman who suffered overall net losses without fault or negligence in furnishing work, supplies or services during the statutory period between September 16, 1940 and August 14, 1945. Such a subcontractor or materialman, not being eligible to have his claim considered under the First War Powers Act, 1941, would have had no occasion to file, and in all probability would not have filed, a claim for First War Powers Act relief, that avenue of relief not being open to him. And yet, it is obvious under the clear-cut language and express provisions of Section 3 of Public Law 657 that if such a subcontractor or materialman had filed a written request for relief under the Contract Settlement Act of 1944 before V-J Day (August 14, 1945), such request would unquestionably qualify for relief under the provisions of Public Law 657. Otherwise, the provision for the filing of a written request for relief before V-J Day would have automatically barred all claims of subcontractors and materialmen and would have been clearly inconsistent with the plain intent of Congress to extend the benefits of the Act to them.

This language of the *original bill* S. 1477 (never enacted) herein referred to was entirely eliminated from the Act which ultimately became the law and in its place was inserted the provisions of Section 3 of Public Law 657 which expressly negatives the original intention.

Paragraph 204 of the Executive Order in question, obviously was written to cover provisions of the original bill which were clearly and specifically rejected by Congress and never passed.

The Executive Department attempts to make effective a provision which Congress expressly repudiated.

The United States Court of Appeals (D. C. Cir.) in *Border Pipe Line Co. v. Federal Power Commission*, 171 Fed. 2nd 149, 152 (Nov. 22, 1948) holds: "We cannot write into an Act of Congress a provision which Congress affirmatively omitted."

The limitations set forth in the provisions of Executive Order 9786 apparently were drafted on the basis of the Act as *originally* introduced and are clearly not regulations covering the Act in its final form. Those regulations under the guise of being promulgated for the purpose of administering the Act limits restrictions and nullifies the clear, unmistakable, unambiguous language, spirit and purpose which is set forth in the legislation by virtue of which the petitioner has sought this remedy.

In the case of *Zazore v. U. S.*, 162 Fed. 2nd 443, the court declared the regulations under consideration were invalid and states at page 444:

"Nothing is said *in the statute* about equalizing the sum over the life expectancy of the beneficiary. The regulation does that. In other words; the regulation sets up a formula different than that prescribed by Congress. The Veterans Administration may by regulation carry out the provisions which Congress

lays down in the Statute, but it may not *alter* the provisions prescribed by Congress. Congress declares the law. The administration carries it out. (Citing authorities.)"

At page 446, the court states:

"If Congress chose to be generous, we know of no rule of law that authorizes the Veterans Administration to inaugurate an economy program. Even if Congress passed the Act unwisely, we know of no authority in law that authorizes the Veterans Administration, or even the courts, to correct it. Congress is the judge of its own wisdom limited only by the Constitution. The generosity of Congress to Veterans has never been admitted, officially, to be unwise. The language Congress used was plain. The regulations distorted the language."

(5) The *original bill* S. 1477 (never enacted) contained no provision for a judicial proceeding. It provided merely an additional grant of administrative power to amend or modify contracts without consideration. The amendment or modification of a contract under the First War Powers Act, 1941, was discretionary with the Government department or agency concerned. *Its administrative decision was final and not subject to judicial review.*

Not so S. 1477 finally enacted as Public Law 657. The power granted by that Act, i. e., the power to consider, adjust and settle upon an equitable basis claims of contractors, subcontractors and materialmen for losses suffered is obviously quasi-judicial in nature. The test was no longer to be whether to grant relief would facilitate the prosecution of the war, but rather whether the claim was an equitable one for losses incurred without fault or negligence.

Such being the grant of power, Congress provided a judicial procedure for the enforcement of the right and

benefit conferred by the statute. Should the claimant be dissatisfied with the decision of the department or agency initially processing his claim, he is given the right by Section 6 of the statute to bring a plenary suit in the Federal Court (and, by amendment of the statute, in the Court of Claims) to try out *de novo* before that court, sitting as a court of equity, "the equities involved in such claim." From the decision of that court either party may appeal as in other equity cases. *Warner Construction Co. v. Krug*, 80 Fed. Supp. 81.

(6) Under Section 201 of the First War Powers Act, 1941, the Governmental agency or department concerned could and would in an appropriate case agree to an amendment or modification of an existing contract without regard to whether the contractor had made overall net profits on other Government contracts. The only test in cases "without consideration," was whether to grant the relief requested was necessary to facilitate the prosecution of the war. Consistent with this practice, the *original bill S. 1477* (never enacted), contains no provision limiting the amount of relief which a Government department or agency may award by an amendment or modification of a contract.

The bill S. 1477 finally enacted as Public Law 657, however, in Section 2 specifically limits relief to the contractor's, subcontractor's or materialman's overall *net losses* on all war contracts or subcontracts with the Government during the statutory period, September 16, 1940 to August 14, 1945.

As further proof that Public Law 657 is not a mere amendment or extension of Section 201 of the First War Powers Act, 1941, Section 2 of Public Law 657 requires the Governmental department or agency also to take into consideration action taken under (1) the Renegotiation Act (50 U. S. C. A. Appendix 1191), the Contract Settle-

ment Act of 1944 (41 U. S. C. A. 101-125), or similar legislation; (2) Section 201 of the First War Powers Act, 1941; and (3) "relief proposed to be granted by any other department or agency *under this Act.*" (Emphasis added.) In other words, Congress explicitly recognized that "*this Act*" (*Public Law 657*) is a separate and distinct Act and is different from and not merely an amendment or adjunct of Section 201 of the First War Power Act, 1941. A similar Congressional discrimination between relief under the First War Powers Act, 1941, and "relief otherwise allowable under *this Act*" (emphasis added) appears in Section 3 of the statute.

The questionable propriety of the practice of resorting to legislative history where we have unambiguous enactment has been recognized by Mr. Justice Jackson in an article entitled "The Meaning of Statutes: What Congress Says", appearing in 34 American Bar Association Journal 535 in which he stated:

"I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. * * *

"And, after all, should a statute mean to a Court what was in the minds but not put into the words of the men behind it, or should it mean what its language reasonably conveys to those who are expected to obey it."

The outstanding factor in the legislative history of the Lucas Act is the difference in the language of that Act as it was originally introduced to Congress, and the Act that was ultimately enacted.

The wisdom in the observations of Mr. Justice Jackson above referred to becomes apparent in the light of recent

Congressional Action which we have discussed under Point IV of this brief.

III.

THE SETTLEMENT AGREEMENT OF FEBRUARY 20, 1945 IS NO BAR TO PETITIONER'S CLAIM UNDER PUBLIC LAW 657.

The consideration by the District Court of the effect of the Settlement Agreement is again based not upon any language of the Act itself but upon other considerations.

The District Court again has failed to read the simple unambiguous language of the statute and it is the Court's observation (Rec., p. 28): "The legislative history is barren of any suggestion that a binding and valid compromise, resulting from negotiations of the interested parties supported by a consideration on both sides followed by an exchange of releases, may be disregarded by claimants to the gratuity extended to the Act of August 7, 1946." (Lucas Act.)

Judge Holtzoff in *Warner Construction Co. v. Krug*, 80 Fed. Supp. 81, effectively deals with this contention as follows:

"The Government contends that this action does not apply because the plaintiff's claim had been adjusted and settled under the First War Powers Act, 1941. This adjustment and settlement being embodied in an amendatory contract between the plaintiff and the Government. This amendatory contract contains a general relief, running from the plaintiff to the Government.

"Ordinarily, such a settlement, and particularly such a general release, would necessarily preclude the assertion of claims for any additional payments under the contract to which the settlement related.

"Section 3 of the Act of August 7, 1946, however, contains the following provision:

"A previous settlement under the First War

Powers Act of 1941, or under the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under this Act.'

"It is contended by the plaintiff that this provision waives the definitive effect of the previous settlement and waives the rights of the Government under the general release which it had received.

"Obviously the Congress has the right to waive a release in behalf of the government and it would seem under a liberal construction of this provision that this is just what the Congress did.

"The Government claims, however, that the term 'settlement' should be limited to a unilateral adjustment of a claim made by a government agency, and does not extend to agreements embodied in a contract, or a settlement embodied in a contract.

"In other words, the Government claims that if the administrative agency had settled the claim, that settlement would not preclude further relief. But because the settlement was embodied in the bilateral contract or agreement, which included a release, that such a settlement is not waived by the Act of Congress.

"The Court is unable to find a tenable basis for the Government's contention. The statute is clear and unambiguous. It provides that a previous settlement under the prior act shall not operate to preclude further relief otherwise allowable under the Act.

"A settlement consummated by bilateral agreement is just as much a settlement as a unilateral adjustment or allowance of a claim." The term 'Settlement' covers both methods of adjusting a claim.

"It is obvious to the Court that it was the intention of the Congress, by the Act of August 7, 1946, to authorize Government agencies to make adjustments of claims in addition to any adjustment which had been previously made. Further, a court review was provided for in the 1946 Act, which had not been provided for in the original First War Powers Act."

The case of *Illinois Surety Co. v. United States*, 240 U. S. 214 cited by the District Court (Rec. p. 28) is not

at variance, nor does it contradict any of the contentions of the plaintiff. Every case that is cited to sustain a legal principle must be analyzed to ascertain the problem that the court there had before it, if we are to understand the import of the language. The above cited case involved the determination as to when the time to bring an action was to commence to run (P. 217). The action was to "be commenced within one year after the performance and final settlement of said contract, and not later."

The statute there being considered, involving the element of the determination of the lapse of time, necessarily involved judicial construction of when that time commenced to run. The purpose of the language of that act as set out on page 218 was to allow the Government to determine the status of its account with the contractor. That the language there used was not intended to denote payment is clear from the following language on page 218:

"Indeed, if an amount were found to be due from the *contractor*, and he was insolvent, there might be no payment; and, if payment were essential, there would be no date from which the time for the bringing of the creditors' action could be computed." (Italics ours.)

The Court in that case recognizing the fact that the problem of interpreting language, was to apply its determination so as to give effect to the Act, and realizing that in other statutes, that the same or similar language would have a different meaning, says at page 221:

"We should not say, of course, that instances may not be found in which the word 'settlement' has been used in acts of Congress in other sense, or in the sense of 'payment'".

The statute does not provide, nor are there any combinations of words or phrases that can give rise to any such

conclusions, that the previous settlement referred to in the Act must have had new circumstances arising subsequent to the settlement to afford further relief.

It is quite apparent that the word "settlement" in the Lucas Act was not used in the narrow sense contended for by the respondent.

Section 3 speaks of settlements under the First War Powers Act, 1941. The only settlements authorized by that Act and the Executive Orders supplementing it were settlements entered into by agreement.

Section 201 of the First War Powers Act, 1941 provides:

"The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort * * * to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon * * * whenever he deems such action would facilitate the prosecution of the war." 50 U. S. C. A. § 611, p. 241.

Pursuant thereto, the President, on December 27, 1941, promulgated Executive Order 9001; providing in part as follows:

"3. The War Department, the Navy Department, and the United States Maritime Commission may *by agreement* modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into *agreements* with ~~contractors~~ and/or obligors, modifying or releasing accrued obligations of any sort, * * * whenever in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated." (Italics added.)

The only settlements that were authorized by these Executive Orders were those entered into by *agreement*. The so-called war agencies had no authority to make settlements in any other way. No settlement agreement was made without first obtaining a settlement "agreement" from the contractor under which the contractor accepted the adjustment as a complete and final one. There was no such thing as a unilateral settlement under the First War Powers Act, 1941.

The Contract Settlement Act of 1944 referred to in Section 3 of the Lucas Act provides:

"Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods."

We must take the words in their ordinary meaning. "Previously" obviously means something that has gone on before. The word "settle" according to the Webster's 20th Century Dictionary, Unabridged Edition, means—to place in a fixed or permanent position; to establish; to determine as something which is exposed to doubt or question; to free from uncertainty or wavering; to make firm, sure, or consistent; to adjust, as something in discussion or controversy; to bring to a conclusion; to arrive; to furnish; to close up; as, to settle a dispute by agreement, compromise or force; to make sure or certain, or to make secure by a legal or formal process or act; to liquidate; to balance; to pay; to adjust. To become fixed or permanent; to assume a lasting form or condition. The word has an established legal meaning in that it implies a permanent condition. Black's Law Dictionary defines the word "settlement" with reference to contracts as follows: "Adjustment or liquidation of mutual accounts; the act by

which parties who have been dealing together arrange their accounts and strike a balance. *Also full and final payment or discharge of an account.*" *Coleman v. Ferrar*, 112 Missouri 54 at 70, 20 S. W. 441. So again we find that the Courts below are belaboring words by saying that the plain language "previous settlement" does not mean what it says, but means a settlement that does not dispose of the controversy; but means a settlement which leaves something pending; but means a settlement of only *part* of a claim, leaving another part open for discussion, or better yet, a settlement which is not a settlement but is based upon subsequently arising facts. That is not the general or legal concept of a settlement.

The reading into the Act of something that is not there is apparent in the *United Concrete Form Products Company, Inc.* decision of the Navy Department Board, Commerce Clearing House, 4 C. C. F. Par. 60,449, referred to in the District Court's memorandum (Rec., p. 24) in which the argument is made, that in order for a claim to be otherwise allowable, the right to further relief under the First War Powers Act as to certain portions of the claim would have to be specifically reserved for further consideration by the terms of the settlement itself, or a new request for relief, upon which final action was not taken before August 14, 1945 would have to be submitted.

There is not one word in the Act to support such a conclusion. The Act was designed to compensate contractors and subcontractors for the net losses incurred by them without fault or negligence on their part in the performance of all of their Government contracts. The regulations recognize this fact by requiring that the claimant set forth the contract price, the cost of performance, the amount received and the net loss or profit on all of the Government contracts of the claimant. The claim is then restricted only to the net loss on all of the contracts.

The contention that for a claim to be otherwise allowable after a settlement had been made, the right to further relief would have to be specifically reserved for further consideration by the terms of the settlement itself, is a construction of language opposed to the plain language in the Act itself. The definitions of the word "settlement" as we have hereinabove set forth are the plain and ordinary meaning of the word. The legal definition as given by Black "** * * full and final payment or discharge of an account*" is diametrically opposed to the definition by the Courts below that a previous settlement would reserve for further consideration undisposed-of items. A settlement disposes of the controversy, fully, completely and finally. If the agreement does not do so it is not a settlement. It is an agreement covering part of the controversy which is not settled until all of the issues have been fully agreed upon and allowed.

The further contention that the phrase "previous settlement" embraces the concept that after the settlement shall have been completed that a new request for relief must have been filed and pending prior to August 14, 1945, is again not based upon any language of the Act. It is, indeed, such a strange construction that no attempt is made anywhere to justify it except to state that the statute contains no authority for the Government to revive a request for relief and, therefore, they assume that a second request for relief would have had to be filed in apt time to come within Section 3, even though a previous settlement had been effected.

The plain and unambiguous language of the Act makes it clear that it was the intention of Congress to give relief for losses with respect to which a written request for relief was filed on or before August 14, 1945. If such losses were previously settled and disposed of it is but further

evidence of the legislative intention that such previous settlement with respect to which a written request for relief was filed and which still resulted in a loss to the contractor shall not operate to preclude further relief otherwise allowable under this Act. That is the plain and unmistakable language of the statute. It is unambiguous. The attempt to nullify the will of Congress by executive legislation (which power to legislate was not granted in this Act) should not prevail against the clear and obvious intendments of Congress.

If the word "settlement" means "full and final payment or discharge of an account" that is the exact definition and construction that we must give to the release of the trustee. There is no question but that it was given in exchange for and as a result of "full and final payment or discharge of an account". There was no doubt that the settlement did not reimburse the estate for the amount that it contended was due. The settlement moneys which were received left the estate with a large net loss on its Government contracts.

The legislature has seen fit to allow contractors and subcontractors to obtain reimbursement for the net losses on their Government contracts. That such relief is to be granted in this case is apparent by the clear statement that a previous settlement shall not operate to preclude relief otherwise allowable under the Act. It is not for the President or any other administrative agency to enact new legislation by promulgating rules which emasculate the purposes of the Act.

Section 204 of the Executive Order's " * * * and no claims shall be considered if final action with respect thereto was taken on or before that date" (August 14, 1945) is diametrically opposed to the language of Section 3 of the Act which provides that a previous settlement shall

not operate to preclude further relief *otherwise allowable under the Act.*

The words of the legislature must be taken in their plain and literal meaning. The plain and obvious language thereof should not be tortured so that the clear and stated word becomes nullified by construction that involves absurdity or contradiction. The statute, being clear and unambiguous, is not subject to construction.

The petitioner does not contend that the settlement agreement in this case was not a proper and binding document at the time it was entered into.

The petitioner does contend, however, that the settlement agreement which resulted in the giving of the release, left the petitioner (and the bankrupt estate which he represented as Trustee) with a large and substantial loss on the contracts that the bankrupt had entered into with the Government.

Congress had seen fit to reimburse a contractor (who without his fault or negligence has sustained a loss in his Government contracts) to recover the amount of his net loss, and to that end set out in the Lucas Act a provision that a previous settlement shall not operate to preclude relief otherwise allowable under that Act (Section 3 of the Lucas Act).

The settlement agreement involved in these proceedings comes squarely within the intention of Congress in this respect.

The Supplemental Agreement of February 20, 1945, that is referred to by Respondent was entered into on behalf of the Government only pursuant to such authority which had been granted to Governmental Departments and that authority was found under the First War Powers Act, 1941 and the Contract Settlement Act, 1944.

The Settlement Agreement (Rec. p. 9) was made par-

suant to Section 27 of the Bankruptcy Act (U. S. Code, Title 11, Chapter 4, Section 50) which provides for the manner in which courts of bankruptcy can pass upon a compromise of claims, and is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates and for the purpose of determining dubious issues. (Collier on Bankruptcy, 14th Ed., Vol. 2, Page 1082, par. 27.02.)

Section 27 of the Act above referred to states:

"The Receiver or Trustee may, with the approval of the Court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

Collier on Bankruptcy, 14th Ed., Vol. 2, Page 1090, par. 27.04, states the law to be:

"The approval of the Court of a compromise is not a judicial determination of any legal defenses made by the other party to the controversy"

That a settlement agreement pursuant to Section 27 of the Bankruptcy Act is merely a contract between the parties which was approved by the Court is further evident from the holding in, *in re Sobod, Inc.*, 25 Fed. Supp. 344, District Court S. D. N. Y., wherein the Court states at page 345:

"The Trustee in Bankruptcy had of course the remedy of plenary suit against the respondents to enforce the compromise. Or he might have elected to rescind the compromise because of the default and to go ahead with his suit on the original claim." (Italics ours.)

That a settlement under Section 27 of the Bankruptcy Act is *not* an adjudication on the merits, but only ratification of an agreement between the parties, is further evident from the statement of the Court in Petition of Stuart,

et al., In-re National Artificial Silk Co., 272 Fed. 938 (C. A. 6th Circuit) wherein the Court states at page 941:

"In determining the advisability of compromise, the Trustee and the Court had the right to take into account the uncertainty and cost of litigation, as well as the existence of unsettled questions of liability." (Citing cases.)

A reading of Section 27 of the Bankruptcy Act indicates that it is the *receiver* or *trustee* who is to compromise the controversy. The court merely approves the agreement or disapproves it as the case may be. The Order of the court pursuant to the Petition of the trustee for the approval of a compromise of the controversy is tantamount to nothing more than a consent decree.

A consent decree is not a judicial determination of the rights of the parties. It is not purport to represent the judgment of the court, but merely records the agreement of the parties. *Lefor v. Jones*, 338 Ill. App. 173; 87 N. E. 2nd 48 (and cases cited).

The Case of *Hodgson v. Vroom*, 266 F. 267, C. A. (2nd Cir.) states the law to be at page 268:

"The distinction between a decree in common form and a consent decree is the difference between a consent to submit a case to the court for decision and a consent as to what the decision shall be. When there is a consent as to what the decision shall be, the decree is a 'mere agreement of the parties under the sanction of the court, and is to be interpreted as an agreement.' "

The document of February 20, 1945, is entitled a "Supplemental Contract." It is obvious that the words "previous settlement" under the First War Powers Act, 1941, of the Contract Settlement Act of 1944 as used in Section

3 of Public Law 657 did not refer to a unilateral administrative determination but bilateral agreements. The very language of Section 201 of the First War Powers Act, 1941, empowers the Governmental agencies involved to "enter into contracts and into amendments or modifications of contracts" and Executive Order 9001 provided "Amendments and modifications of contracts may be with or without consideration * * *."

Settlements under Section 201 of the First War Powers Act, 1941, and Executive Order 9001 invariably took the form of formal "Supplemental Contracts;" which were bilaterally executed by both the claimant and the Government. *Howard Industries, Inc. v. United States*, Court of Claims, No. 48874, states at the bottom of Page 6 of its decision, with reference to the First War Powers Act, 1941, and regulations under Executive Order 9001: "This regulation clearly authorized settlements by bilateral agreements." To the same effect is the holding in *Warner Construction Co. v. Krug*, 80 F. Supp. 81.

Indeed, a bilateral agreement seems the only method of settlement authorized by Section 201 of the First War Powers Act, 1941.

The Contract Settlement Act of 1944 (41 U. S. C. A. 106(e)) provides:

"Any contracting agency may settle all or any part of any termination claim under any war contract by *agreement with the war contractor*, or by determination of the amount due on the claim or part thereof without such agreement, or by any combination of these methods." (Ital. ours.)

A bilateral agreement is again indicated and invariably Settlement Agreements under the Contract Settlement Act of 1944 took the form of formal "Supplemental Contracts" formally executed by and between both the claimant and the Government.

Certainly the "Settlement Contract" involved here was executed on behalf of the Government by virtue of some authority granted to the agencies on its behalf. We repeat—that authority is to be found only in the First War Powers Act, 1941, or the Contract Settlement Act of 1944.

The Navy Procurement Directive of July 7, 1943 (Commerce Clearing House, Government Contracts Reporter, Vol. 1, P. 2272)¹ in discussing the scope and authority granted to the Navy Department under the First War Powers Act, 1941, and Executive Order 9001 indicates clearly that the only authority for the Government in entering into the "Supplemental Contract" of February 20, 1945, was the authority granted under the said First War Powers Act, 1941, and Executive Order 9001. The aforesaid "Settlement Contract" was clearly one made

I. INTRODUCTORY AND DEFINITIONS.

1. In the making of amendments and modifications of contracts and agreements under the First War Powers Act 1941 and Executive Order 9001, the general principles and procedure established by this directive shall be followed. * * *

2(a) For the purpose of easy reference in this directive, the contracts and agreements to which the United States is a party are divided into (i) completed contracts and (ii) open contracts. A "completed contract" is a contract or agreement under which all work, which is required to be done to entitle the private contractor to final payment, has been done. All other contracts and agreements are termed "open contracts."

(b) Amendments and modifications may be divided into (i) those accompanied by substantial consideration to the United States (hereinafter referred to as "with consideration") and (ii) those not accompanied by such substantial consideration (hereinafter referred to as "without consideration").

(c) The term "consideration," as used herein, means performance by the contractor in excess of the performance required under the contract from the contractor or the giving up by the contractor of rights or benefits to which the contractor is entitled under the terms of the contract. The descriptive adjective "substantial" has been used in paragraph 2(b) to exclude from the designation "with consideration" the cases in which the consideration is more formal than real. In other words, before an amendment or modification can be termed "with consideration," the consideration must have some substance and reality. It will be re-

"with consideration" by virtue of the fact that the trustee had on record and had asserted a substantial counterclaim against the Government as is indicated in the copy thereof attached to and made a part of the Exhibit referred to at Page 32 of the Printed Record and again set forth in the "Settlement Contract" itself as it appears in the second paragraph on Page 13 of the printed record.

We especially call the Court's attention to that portion of the Procurement directive set forth in the footnote 1 set out below, viz.: "It will be recalled that, prior to the First War Powers Act, 1941, and Executive Order 9001, contracting officers had no authority to amend contracts or agreements * * *." Following this language are exclusions not of the type covered by the Settlement Agreement.

called that, prior to the First War Powers Act, 1941, and Executive Order 9001, contracting officers had no authority to amend contracts or agreements except in cases where tangible and actual benefits (*i. e.*, substantial consideration) would pass to the United States, *e. g.*, decreases in contract prices, longer guaranty periods, earlier deliveries, work in excess of that required under the contracts, etc. Such amendment and modifications, which could have been so made prior to the First War Powers Act, 1941, and Executive Order 9001, are the ones included within the designation "with consideration."

II. COMPLETED CONTRACTS.

3. Except for change orders and other modifications made or to be made pursuant to the provisions of the contract, contracting officers shall not amend or modify completed contracts, unless authorized or directed so to do by the Office of Procurement and Material. If the proposed amendment or modification to a completed contract is supported by consideration and is not to be made pursuant to the provisions of the completed contract a new contract should normally be made. If the making of a new contract is not practicable (whether for lack of consideration or otherwise), the application for an amendment or modification should be referred for action in accordance with the procedure set forth in paragraphs 6 and 7.

III. OPEN CONTRACTS.

4. Amendments and modifications with consideration of open contracts may be made by contracting officers to the same extent and in the same manner as original contracts are made by such contracting officers.

Also please note that the parties to the agreement of February 20, 1945, on behalf of the Government are solely the Navy Department Officers of the Procurement & Material Division of the Finance Division, the Contracting Officer and the Purchasing Officers of the proper Navy Departments—which is the authority contemplated under the First War Powers Act, 1941.

That the petitioner has a meritorious claim is self evident from the fact that pursuant to the settlement agreement (Rec. P. 9) the Government paid the petitioner a sum approximating \$15,000.00.

The District Court states in its opinion (Rec. P. 17):

"These parties entered into an agreement on February 20, 1945, compromising and settling this controversy, and the agreement was authorized and approved by this Court."

The Court goes on (Rec. P. 27):

"On February 20, 1945, the date the settlement agreement was executed, the First War Powers Act was in effect. The petitioner presented his claims for money alleged due the contractor at the time. Presumably all claims were presented and considered. If the petitioner had any claims for losses naturally he then would have made them known. In any event a settlement was made and the petitioner, as a trustee in bankruptcy, on behalf of the contractor and with the authority and approval of the court executed an instrument in writing releasing and forever discharging the Government * * *."

What the Courts below have overlooked is the fact that the petitioner could not have presented a claim for losses at the time of the settlement agreement on February 20, 1945 (when the First War Powers Act, 1941, was in effect). The petitioner at that time could not have asserted a "claim for loss" which was within the contemplation of

Public Law 657, Lucas Act, because Public Law 657 was not enacted into law until a year and a half later—August 7, 1946.

The parties hereto compromised and settled their controversy, the respondent proceeding under the authority of the First War Powers Act, 1941, and the petitioner as a trustee in bankruptcy sought and obtained the approval of the District Court to execute the agreement on behalf of the bankrupt estate. There were no hearings on the merits of the controversy; there was no evidence presented to the Court for determination; the agreement was entered into solely between the parties who compromised and settled their differences outside of the Courts.

The United States Court of Claims in *Howard Industries, Inc. v. United States*, No. 48874, decided April 4, 1949, holds at the bottom page 8 of its opinion:

“Paragraph 204 of the Executive Order is merely a paraphrasing of the provision so omitted and is in direct conflict with the wording of the Lucas Act as enacted and with the intent revealed in its legislative history. *Our conclusion is contrary to the decision of the District Court in the case of Fogarty v. United States*, 80 Fed. Supp. 90, which case we have examined with care, but with which we find ourselves unable to agree.” (Emphasis ours.)

IV.

RECENT CONGRESSIONAL ACTION CLEARLY INDICATES THAT THE OPINIONS OF THE COURTS BELOW, FROM WHICH THIS APPEAL IS TAKEN, ARE ERRONEOUS AS BEING BASED UPON A MISINTERPRETATION OF PUBLIC LAW 637.

Recent Congressional action in passing two Amendments to the Lucas Act, H. R. 3436 and S. 3906, clarified the issues involved in these proceedings so that there is no further opportunity for debate on what the Congressional intent was in passing the Lucas Act.

The Senate report to the 81st Congress, 2nd Session Senate (Calendar No. 1612, Report No. 1632), beginning with the Statement on Page 2 thereof, states:

"STATEMENT

"As has been indicated above, the purpose of H. R. 3436 and S. 873 is to amend Public Law 637 of the Seventy-ninth Congress so as to relieve contractors who, it is felt, have been deprived of the intended relief under that act *because of the restrictive administration* of the latter.

"The original Lucas Act became law principally because of the inadequacy of the contract relief provisions of the First War Powers Act of 1941 (sec. 201), act of December 18, 1941 (58 Stat. 839), by which it was provided that—

the President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, to enter into contracts and info amendments or modifications of contracts heretofore or hereafter made and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the prosecution of the war.

"Certain of the war agencies refused to make further adjustments of claims on the ground that there was no longer a basis for the First War Powers Act relief provisions, since an adjustment could not "facilitate the prosecution of the war," the war having been ended for that purpose.

"In this state of affairs, the Congress enacted the Lucas Act. As first introduced, this act was clearly intended to offer a continuing ground for relief under the First War Powers Act, even though the adjustment of the contract could no longer "facilitate the prosecution of the war." However, it was decided to change the language, so that the act, when finally enacted, read, in part:

*** to settle equitable claims of contractors *** for losses (not including diminution of anticipated profits) incurred *** without fault or negligence on their part in the performance of such contracts ***

"Further, the bill as introduced originally contained the clause:

This section shall not be applicable to cases submitted under section 201 of the First War Powers Act, 1941, which have been disposed of under such section on their merits prior to August 14, 1945.

"As finally passed, however, that language was entirely omitted so as not to make a previous determination conclusive and, indeed, as enacted the Lucas Act provided in section 3:

a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act, 1944, shall not operate to preclude further relief otherwise allowable under this act.

"The present proposed amendments to the Lucas Act stem largely from erroneous and restrictive interpretation of that act. It has been contended on the part of the Government that the Lucas Act was intended to be a mere continuation of the First War Powers Act in favor of these contractors. On the other hand, the

erities of the Executive order and the proponents of the proposed legislation have claimed that the Lucas Act, in view of the language cited in the preceding paragraph, was intended to give a much broader basis of relief than that offered by the First War Powers Act." * * *

Continuing on Page 4 of the report, the Statement goes on:

"It is a fact nowhere denied that very little relief has been afforded aggrieved contractors under the Lucas Act. It was not denied by the Government that, out of 290 petitions filed, only one contractor had actually been paid. Some of the contractors were denied relief because they had an over-all net gain although sustaining a net loss on one contract. Another major cause of denial was the narrow administrative (and sometimes judicial) interpretation placed upon the act. The Government in opposing any amendment of the present act, alleges that this is a correct interpretation of the act. The proponents of amendment allege that those interpretations are in direct contradiction of the act. These arguments are sometimes stated in terms of the act itself, sometimes in terms of Executive Order 9787 issued, supposedly, to carry it out.

"The principal sections of the Executive order challenged as an encroachment upon the congressional intent expressed in the Lucas Act are sections 204 and 307. Section 201 provided that no claim should be considered unless filed with a war agency in accordance with the act and the regulations on or before February 7, 1947. Section 204 provided that—

No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request with respect thereto was filed with such war agency on or before August 14, 1945, and no claim shall be considered if final action with respect thereto was taken on or before that date.

"As will be hereafter noted and discussed, it is alleged

that section 204 is in contravention of section 3 of the Lucas Act, which provides that—

a previous settlement under the First War Powers Act, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this act.

"On the other hand, it is alleged by the defenders of the Executive order that the supposed derogation from the Lucas Act is no derogation in fact, and that allegations to the contrary arise from a misinterpretation of the intent of the Lucas Act, and from misinterpretation of the words "settlement" and "otherwise allowable."

"The 'written request' demanded by both the act and section 204 of the Executive order has been held by the agencies to mean a written request for 'money' relief, although no such limitation is in the Lucas Act or even in the Executive order. Indeed, there were at the time no such things as money claims. Relief possible under the First War Powers Act was only such relief as might be had by modifying the terms of contracts. Hence, claims for relief under that act could, technically, ask no more.

"Section 307 of the Executive order in effect interprets the Lucas Act as a mere extension of the First War Powers Act and as not affording any broader basis for relief. It reads:

Relief with respect to a particular loss claimed shall not be granted under the act unless the war agency considering the claim finds, or, in the case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945.

"Beyond civil, the effect of section 307 is a restriction of the Lucas Act to cases which would have been allowable under the First War Powers Act, section 201. The Government does not deny this interpretation, but in

fact urges it as manifesting the true congressional intent in passing the Lucas Act.

"The Court of Claims and the district courts differ in their interpretation of the meaning of the Lucas Act and the effect of the Executive order upon it. The holding of the Court of Claims is in accord with those who insist that the Executive order is in contravention of the Lucas Act, while the district courts appear to be divided as to the validity of the position of the Government. Such a diversity of adjudication 5 years after the end of the 'shooting war' demonstrates a complete failure of the purpose of the Lucas Act and of Congress to afford a plain, speedy, and adequate relief for smaller contractors who suffered ruinous losses." * * *

The conclusions of the report on page 6 are:

"It can be fairly stated that, if the intent of Congress in passing the Lucas Act was to offer relief beyond that afforded by the First War Claims Act, the administrative interpretation and the Executive order have aborted that intent. However, even if the holding of the Court of Claims is adopted as affirmative legislation, it should be perhaps considered that some of the amendments proposed to H. R. 3436 would carry the Lucas Act beyond its original intention, even as understood by the proponents of H. R. 3436. Some of the amendments would cover only one case or very few cases. Particularly, the amendment to require the allowance of the net loss on each contract would seem to overlook the fact that contractors who lost money on one contract frequently were made whole by the award of another contract or other contracts upon which a profit was made. It would seem generally that the intent in H. R. 3436 is merely to secure relief where untenable administrative interpretation of the Lucas Act had disallowed it, and that most of the amendments further expanding the grounds of relief would be undesirable. Some provision for reconsideration of cases disposed of under the administrative order would appear necessary if the purpose of H. R. 3436 is to be effected."

"The committee are of the opinion that H. R. 3436 should be enacted, since it is abundantly clear that the administrative interpretation of the Lucas Act is in effect an abrogation of that act. The committee believe that, with the amendments they have herein approved, H. R. 3436 will enable those contractors who have just claims to receive relief. The type of notice which is necessary under the committee bill is informal enough to permit contractors who called a loss or an impending loss to the attention of the Government to escape penalization because of technical interpretations of the words "request for relief," or because their claim was not one that would have been allowed under section 201 of the First War Powers Act, 1941. It is the opinion of the committee, as demonstrated in the report, that the purpose of the Lucas Act was to afford a broader basis of relief than had been given in the First War Powers Act, 1941, and that, beyond question, this purpose was aborted by the strict administrative interpretations. The intent of the present bill is to restore the relief provisions of the Lucas Act, and the committee, in approving H. R. 3436, wish it made clear that this bill, as amended, affords what the committee consider a just and equitable basis for relief, not confined to relief which might have been afforded under the First War Powers Act. The committee bill does not, however, broaden the class of persons entitled to relief under the act, nor does it permit any claimant who has not already timely filed his claim under the act to come in with a new claim at this late date.

"The committee are of the opinion that H. R. 3436 should be enacted, but not in the form in which it reached the Senate. While the committee agree that the administrative interpretations of the Lucas Act in effect abrogated that act, making relief virtually unobtainable, they feel that the provision of H. R. 3436 relating to oral notice is too broad, and that under it the Government would be assailed with claims which, because of the lapse of time, the dispersal of personnel, and the difficulty of rebutting pos-

sibly collusive evidence, the Government might be unable to meet. Moreover, the proposed language of H. R. 3436 redefining "relief" should be amplified to make it plain that the *notice* of losses sustained or impending, rather than the form of request for relief, is the important consideration. The committee have accordingly redrafted section 3 of the Lucas Act, as proposed to be amended in subsection (b) of the committee bill.

"Such is the heart of the present difficulties. The Lucas Act intended only that there should be no surprise claims. Unfortunately the word "relief," used originally, has technical connotations which may be and have been exploited to prevent the recourse provided and intended by the Lucas Act.

"The committee feel that in requiring written notice they are enabling the Government to defend itself against fraudulent claims. The committee feel that while the Lucas Act was subjected to a destructive interpretation, a new amendment thereto should require that contractors meet reasonable terms imposed by the act."

The veto messages of the President with regard to the Amendments H. R. 3436 and S. 3906 passed by Congress and above referred to (81st Congress, 2nd Session, Doc. No. 629 Cong. Rec. Vol. 96, No. 129, page 9745, and Doc. No. 203, Cong. Rec. Vol. 96, No. 165, page 13143) clearly indicate that the President has always contended that the Lucas Act was proposed to limit the Act to "claims or requests for relief that would have been granted under the First War Powers Act of 1941 but for the termination of hostilities with Japan on August 14, 1945."

The President in his veto message on H. R. 3436 (H. Doe. No. 629, 81st Cong.) and repeated in his veto message on S. 3906 (S. Doe. No. 203, Congressional Record, Vol. 96, No. 165, page 13143) stated:

"I cannot accept the contention that the purpose of the

War Contractors Relief Act * * * was other than to provide a basis for relief to those contractors whose cases would have been handled under the First War Powers Act if war had not ended. Had I believed there was a broader purpose, I would not have issued the kind of regulations which were promulgated in Executive Order 9786. These regulations were a faithful attempt to interpret the language of the act as affording nothing more than a statutory basis for the continued processing of written applications for relief under the First War Powers Act which were pending and undisposed of on August 14, 1945. * * *

"H. R. 3436, and the reports recommending its enactment, would radically change the basic purpose of the original War Contractors Relief Act. I believe that in spite of any administrative interpretation which might be made to limit the effects of the bill, its provisions not only require reconsideration of all claims originally filed, but might also be construed to permit reopening of an unknown number of cases settled under the First War Powers Act and the Contract Settlement Act. * * *"

The veto message goes on:

"I further stated that the net effect of a bill which would relax the requirements for filing notice contained in the War Contractors Relief Act and the regulations thereunder, permit the granting of relief beyond that afforded by the First War Powers Act, and exclude the finality of settlements made under the First War Powers Act and the Contract Settlement Act of 1944." * * *

The President, by that statement, therefore has apparently either overlooked or completely ignored the plain, simple, and unambiguous provisions of Section 3 of the Lucas Act which provides:

"* * * but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement

Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." (Italics ours.)

The President desires that the finality of settlements be not disturbed. The Lucas Act and Congress have indicated a contrary intention.

The language of Senator McCarran in reporting S. 3906 to the Senate (Cong. Record, Vol. 96, No. 147, page 41224, July 26, 1950) again reiterates the intention of Congress in its enactment of the legislation now before this Court for consideration. Senator McCarran stated:

"The broad purpose of this bill is the same as the broad purpose of the bill which was vetoed, namely, to effectuate the original intent of Congress in passing the Lucas Act and provide relief to a number of contractors who suffered loss or damage without fault or negligence on their own part. It is meritorious legislation and should be passed." (Italics ours.)

Senator Lucas, the original proponent of the Lucas Act, in discussing the Amendment H. R. 3436, before the Senate (Vol. 96, No. 113, page 8106 of the Congressional Record) stated:

"As first introduced, that act was clearly intended to provide continuing ground for relief under the First War Powers Act, even though the adjustment of the contract could no longer facilitate the prosecution of the war. However, it was decided to change the language, so that the act, when finally enacted, read in part (italics ours):

*'To settle equitable claims of contractors * * * for losses (not including diminution of anticipated profits) incurred * * * without fault or negligence on their part in the performance of such contracts' * * *."*

Senator Lucas, on the same page of the Congressional Record, makes this observation in the last column:

"I think it may be advisable to add that the United States Court of Claims, where these contractors have filed claims in the past, has always held with the original theory of the Lucas Bill. In other words, it has said that they were entitled to relief. But the courts have divided upon the question, and that is one of the strongest reasons why it is desired to amend the act. There is no question about the merit of the claims involved, there is no question about the laws respecting the contracts."

Senator McFarland, in the Congressional Record of July 26, 1950, Vol. 96, No. 147, at page 11224, states:

"As the Senator from Nevada¹ will recall, when this bill² was introduced the Senator from Illinois (Mr. Lucas) expressed his keen interest in it and his willingness to secure its passage. He has asked that I state on his behalf that he hopes very much action may be taken on the bill today."

The Report of The House of Representatives to accompany H. R. 3436 (81st Congress, 1st Session, Report No. 422) is a most enlightening statement in support of the contentions of the petitioner in these proceedings. The report states:

"STATEMENT."

"The bill is designed to correct what is believed to be an injustice to World War II contractors brought about by a variance in interpretation of section 3 of the so-called Lucas Act (Public Law 657, 79th Cong.) between the administering agencies on the one hand and the Congress on the other, which has resulted in the granting of relief in only one instance

1. Mr. McCarran.

2. S. 3906 to Amend the War Contractors Relief Act (Lucas Act).

and rejection of scores of otherwise justifiable claims on flimsy technicalities.

"In general, the official view of the administering agencies is that the sole purpose of the Lucas Act was to afford relief only to those few war contractors who, on VJ-day (August 14, 1945) had applications pending for relief under the First War Powers Act (50 U. S. C., sec. 611) and Executive Order 9001 issued pursuant thereto, but whose applications could not be acted upon because after the capitulation of the enemy on August 14, 1945, no administrative determination could be made that affirmative action would facilitate the prosecution of the war; that only those claims that could be considered under the First War Powers Act, could be considered under the Lucas Act. *We believe this construction to be an erroneous interpretation of the intention of Congress in passing the Lucas Act.* We believe that while relief under the First War Powers Act to World War II contractors was predicated solely on the interest of the Government in prosecuting the war, the Lucas Act was more remedial in its nature. The Lucas Act was broader in its application and under it the contractor was required to show, not that the granting of relief would facilitate prosecution of the war; but that, without fault or negligence on his part, he had suffered a net loss on his Government contracts during the statutory period, and that during that period he had requested relief in writing from the agency or department involved.

"The Committee is informed that the technicality most frequently indulged in by the Government in its rejection of claims under the Lucas Act has been that the request for relief lacked the formalities which the agencies read into the simple language of the act, but as to which the act was silent. Thus, it is contended that the request for relief referred to in the statute required a specific request that the contract be amended without consideration under the extraordinary contracting authority conferred by the First War Powers Act. The act cannot and should not be so read.

"In the urgency of the war years and because of the potpourri of emergency regulations hastily concocted and thrown at war industries, the average contractor had no opportunity to acquaint himself with the niceties and refinements of official red tape. The precise form of an application under section 201 of the First War Powers Act was nowhere prescribed. Applications conformed to no particular style. Some were simple invoices in a context of correspondence or discussions indicating a contract amendment was necessary if the contractor was to carry one; others were couched in indefinite language as part of general correspondence between the agency and the contractor relating to disputes as to contract terms; still others may have been mere memoranda which were embellished by oral representations in the course of conferences. It is the purpose of the bill to relax the agency-imposed formal requirements of these requests for relief and to make equivalents out of such tangibles as demands for payment of losses or statements of such losses which were sufficient to inform the Government or the prime contractor (in the case of subcontractors) that a loss was being suffered, was anticipated, or had been suffered by the contractor or subcontractor in connection with the work in question.

"We do not propose overgenerosity with Federal funds or to reward those who are not equitably entitled. Nor do we propose to be niggardly toward the contractors of World War II by an unduly restrictive definition of the remedial provisions of a relief statute by insistence on unintended technicalities so as to abridge the rights of legitimate claims.

"The courts appear to be divided on the point raised in this report. While some adhere to the statutory construction impressed on the Lucas Act by the Government (*Fogarty v. United States*, 80 Fed. Supp. 90, and *Davidson & Reid v. U. S.*, Civil Action No. 2546-48 in the District Court of the United States for the District of Columbia), more recently the United States Court of Claims has taken the opposite view (*Howard Industries, Inc. v. U. S.*, No. 48874; *Modern Engineer-*

ing Co., Inc. v. U. S., No. 48876; and *Milwaukee Engineering and Shipbuilding Co. v. U. S.*, No. 48888; all decided on April 4, 1949, by the United States Court of Claims on motions to dismiss). Because of this judicial conflict, the committee feels that legislative clarification is more than ever imperative. (Italics ours.)

The House of Representatives Committee on the Judiciary, after the veto message of the President with regard to H. R. 3436, in reporting on the House amendment ultimately enacted as S. 3906 in its Report (81st Congress, 2nd Session, Report No. 2704, July 20, 1950) stated at Page 1 of the Report:

"This bill is in response to the veto by the President on June 30, 1950, of H. R. 3436, which was passed unanimously by both Houses of Congress. It is designed not only to comply with the specifically enumerated proposals contained in the veto message for legislation acceptable to the President, but also to reassert the original purposes of the Lucas Act."

"Consideration of the construction and interpretation of the Lucas Act by the administering agencies clearly reveals the necessity for clarifying legislation. The frustration of the original intent of the Lucas Act is adequately described in the House committee report which accompanied H. R. 3436 (H. Rept. 422, 81st Cong.), to which we advert with approval."

At Page 3, the Report goes on:

"An accelerated national defense program is inevitable as attested by the recent message of the President recommending the reinstitution of many of the wartime controls as a means of protecting the national security in the troublous times that lie ahead. This spells a vastly enlarged program of military procurement and it is essential that the small contractors be encouraged to participate to the fullest extent with the knowledge that they will receive fair and equitable treatment by their Government."

In the light of the foregoing, there can be no further dispute as to the intention of Congress in enacting the Lucas Act now before this Court.

It is clear therefore that it is only by virtue of a misinterpretation of that Act by the Executive branch of our Government that the controversy involved herein (which should be determined on the merits and on facts produced at a trial before a court of competent jurisdiction) has come before this tribunal on questions of law which in light of recent Congressional action are not now subject to debate.

CONCLUSION.

The Courts below, by reason of their misconception and misinterpretation of the intent and purpose of the War Contracts Hardship Claims Act (Lucas Act), have failed to grant unto the petitioner the relief which Congress intended.

The clear and unequivocal language of the Act indicates that the spirit and purpose thereof was to attempt to render justice on the ground of fair play to those who have tried to and have served the Government during the war. The Legislature has indicated to the contractors and subcontractors that they will always receive just consideration in regard to such contracts as are fulfilled during emergency periods. It is an indication to our citizenry that our all-out effort can be supplied without hesitancy because of the assurance that our Government will deal with the contractors on a basis of equity and justice. This type of legislation must of necessity receive a liberal construction. To interpret it otherwise would be to emasculate it. To place the construction upon it contended for by the Courts below would nullify it.

The Act is clear and unambiguous; its intemds are

simple. The clearly stated objectives of the Lucas Act indicate that the petitioner is entitled to a hearing of the cause upon the merits and to such a finding as he is entitled, after the Court shall have determined the equities involved pursuant to Section 6 of the Act.

The petitioner, therefore, respectfully requests that the order of the District Court of August 28, 1948 (Rec. p. 17) granting the respondent's motion for a summary judgment, and the findings of the United States Court of Appeals, Eighth Circuit, in its opinion of August 24, 1949 (Rec. p. 36), affirming the judgment of the District Court, be reversed and that the cause be remanded with directions to proceed with a hearing of the cause upon its merits for the purpose of affording the petitioner the relief to which he is entitled under the Act.

Respectfully submitted,

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APPENDIX.

STATUTES AND EXECUTIVE ORDERS INVOLVED

[Public Law 657—79th Congress]

[Chapter 864—2d Session]

[S. 1477]

41 U. S. C. 106 Note, 60 Stat. 902

Act of August 7, 1946

AN ACT

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U. S. C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the

head of the department or agency concerned or by a central authority therein designated by such head.

SEC. 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945, and shall consider with respect to such contracts and subcontracts, (1) action taken under the Renegotiation Act (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 191-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

SEC. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

SEC. 4. Appropriations or funds available for work, supplies, or services of the character involved in the respective claims at the time of settlement thereof shall be available for payment of the settlements: *Provided*: That where no such appropriations are available, appropriations for payment of such settlements are hereby authorized.

SEC. 5. Each department and agency shall report to the Congress quarterly the name of each claimant to whom relief has been granted under this Act; together with the amount of such relief and a brief statement of the facts and the administrative decision.

SEC. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

Approved August 7, 1946.

Section 37 of P. L. 773, 80th Cong., 2d Sess., approved June 25, 1948, revising 28 U. S. C., amended Sec. 6 as follows:

"SEC. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims, or, if the claim does not exceed \$10,000 in

amount or suit has heretofore been brought or is brought within 30 days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory act, be transferred to the Court of Claims for original disposition in that court."

Executive Order 9786 (11 F. R. 11553) provides in pertinent part as follows:

Regulations Governing the Consideration, Adjustment, and Settlement of Claims Under Public Law 657, Approved August 7, 1946.

By virtue of and pursuant to section 1 of Public Law 657, 79th Congress, 2d Session, approved August 7, 1946, and in the interest of the expeditious disposition of claims under contracts to which this order is applicable, the following Regulations are hereby prescribed to govern the filing, consideration, adjustment, and settlement of claims by contractors against departments and agencies of the Government under the said Public Law.

v

PART I—DEFINITIONS.

101.7 The term "cost of performance" means the reasonable and necessary cost to a contractor or subcontractor of work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, determined in accordance with the accounting practices of the contractor or subcontractor consistently applied during performance of the contract or subcontract, provided such practices accord with recognized commercial accounting practices. Such cost shall include, to the extent reasonable and necessary, direct costs and a properly allocable proportion of indirect costs, but shall not include the following items:

n. Any item of cost which the contract or subcontract or renegotiations therefor expressly contemplated would not be reimbursed or compensated or allowed for.

101.8 The term "contract price" means the aggregate of all amounts (before taxes and statutory renegotiation) paid or payable to a contractor or subcontractor for work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, including any amounts paid or payable pursuant to any amendment, adjustment, or settlement of or on account of such contract or subcontract under the First War Powers Act, 1941, the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, secs. 101-125), or otherwise.

101.9 The term "loss" means the amount by which the cost of performance of a contract or subcontract exceeds the contract price thereof.

101.11 The term "net loss" means the amount by which the aggregate of the costs of performance under all contracts and subcontracts exceeds the aggregate of the contract prices under all contracts and subcontracts, after giving appropriate effect to action in renegotiation proceedings in respect of the statutory period.

101.12 The term "claim" means a claim for relief under the Act.

101.13 The term "claimant" means a contractor or subcontractor who files a claim under the Act.

PART II—FILING OF CLAIM.

201. No claim shall be received or considered by any war agency unless properly filed in accordance with the Act and these regulations on or before February 7, 1947.

202. Each claim shall be in writing and shall contain or shall be accompanied by:

* * *

(e.) A copy of each written request filed on or before August 14, 1945, with the war agency concerned, for relief with respect to the losses claimed.

(f.) A copy of any other written request filed prior or subsequent to August 14, 1945, with any agency for relief with respect to the losses claimed.

(g.) A statement of any other relief sought from the government with respect to the losses claimed.

203. No more than one claim shall be filed under the Act by any one claimant. Each claim shall be filed in quadruplicate with the war agency with respect to whose contracts and subcontracts claim for loss is made. When claim for loss is made with respect to contracts and subcontracts of more than one war agency, the claim shall be filed with the war agency with respect to whose contracts and subcontracts the largest claim for loss is made.

204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date.

* * *

PART III—SETTLEMENT OF CLAIMS.

304. No claim shall be allowed by any war agency except if and to the extent that the war agency finds that the claim is (a) equitable under all the circumstances and (b) for losses incurred without fault or negligence on the part of the claimant.

305. No claimant shall be granted relief under the Act and these Regulations in any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant pursuant to which work, supplies, or services were furnished for the Government during the statutory period.

307. Relief with respect to a particular loss claimed shall not be granted under the Act and these Regulations unless the war agency considering the claim finds, or, in the case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945.

308. Where a claim is settled by agreement between the war agency and the claimant, the agreement shall be reduced to writing and signed by both parties and shall include an unconditional release by the claimant of all claims whatsoever of the claimant against the Government or any department or agency thereof as to all contracts and subcontracts involved in consideration of the claims. Payment, within the limits of appropriations available for such purposes, shall be made by the war agency upon the basis of the executed agreement.

309. Where a claim is not settled by agreement, the war agency shall deliver to the claimant a written statement as to the amount, if any, due on the claim, but shall make no payment of any amount so found to be due until the claimant shall have delivered to the war agency an unconditional release of all claims whatsoever of the claimant against the Government or any department or agency thereof as to all contracts and subcontracts involved in consideration of the claims.

HARRY S. TRUMAN.

The White House,

October 5, 1946.

Section 201 of the First War Powers Act, 50 U. S. C. App. 611, Act of Dec. 18, 1941, 55 Stat. 839, provides:

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems that such action would facilitate the prosecution of the war: *Provided*, that nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further*, That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further*, That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

Title I, Par. 3, of Executive Order 9001, promulgated December 27, 1941 (6 F. R. 6787) reads as follows:

The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any per centum of the contract price and may enter into contracts with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facil-

itated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same thing as any original contract could have accomplished thereunder, irrespective of the time or circumstances of the making of or the form of the contract, amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 6

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY OF
THE INLAND WATERWAYS, INC., A CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA AND NAVY DEPARTMENT—WAR CONTRACTS RELIEF BOARD,
Respondents.

REPLY BRIEF OF PETITIONER.

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Supreme Court of the United States

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MENT—WAR CONTRACTS RELIEF BOARD,

Respondents.

REPLY BRIEF OF PETITIONER.

The Respondent has raised three points in its brief and we will reply to the points in the same order as set forth in that brief.

REPLY TO RESPONDENT'S POINT I.

Background and Purpose of the Lucas Act.

The Respondent in discussing this point completely overlooks or ignores the statements of Senator Lucas, who proposed the original bill *which was never enacted*, wherein the Senator stated recently that the Statute that was ultimately enacted as the Lucas Act was entirely different from the one he had originally proposed. This language of Senator Lucas is set forth on Pages 71 and 72 of our

original brief and we, therefore, shall not repeat that language here.

The recent statements of Congress to which we have referred in point iv of our original brief and the opinions of the courts in *Howard Industries, Inc. v. U. S.*, in the Court of Claims No. 48874; *Warner Construction Co. v. Krug*, 80 Fed. Supp. 81; *Stevens Brown, Inc. v. U. S.*, 81 Fed. Supp. 969, and the history of the Act itself, all conclusively indicate that the conclusions of the Respondent and the courts below in this case are erroneous as to the background and purpose of the Lucas Act.

We cannot conceive of a clearer statement of this fact than the one recently made by Senator McCarran on September 13, 1950, before the Senate which can be found in the Congressional Record, Volume 96, No. 182, at page 14868, wherein he states:

"It was the intent of Congress, in passing the Lucas Act, to offer relief beyond that afforded by the First War Powers Act."

Senator McCarran, at page 14866 of the same Congressional Record, after quoting from *Howard Industries, Inc. v. U. S.*, Court of Claims, No. 48874, stated:

"Mr. President, this ends my quotation at this time from the decision of the Court of Claims. It is an excellent decision, and as one who participated in the drafting of the original Lucas Act, and was Chairman of the Committee on Judiciary at the time the Act was approved by the Committee, who handled the Act on the Floor of the Senate and who has followed it closely ever since, I can testify that this decision correctly states the facts and correctly interprets the legislative history of the Act."

This is from a Senator who speaks with unimpeachable authority.

REPLY TO RESPONDENT'S
POINT II.

Request for Relief.

It is admitted by the Respondent, as he must, that the decisions of the courts below in this case maintain that the request for relief under the Lucas Act must be a request for relief that only could have been granted pursuant to the provisions of the First War Powers Act, 1941.

It is now apparent that their conclusions are erroneous. The conclusion of these courts below is based upon:

1. Their mistaken ideas as to the history and background of the law, and
2. The invalid Executive Orders.

The decision of the Court of Claims in *Howard Industries, Inc. v. U. S.*, No. 48874, has this to say regarding what is meant by request for relief at page 4 of its opinion:

"We cannot agree with the government's contention that the Lucas Act is merely an extension of the First War Powers Act and that only those claims that could have been allowed under that Act may be considered under the Lucas Act. We shall examine paragraph 307 (which is one of the regulations issued pursuant to Section 1 of the Lucas Act) first in the light of the expressed terms of the Act and secondly in the light of the Act's intent as expressed in its legislative history."

The conclusion of the Court of Claims on this point is found on page 5 of its opinion, wherein the court stated:

"We accordingly conclude that paragraph 307 of Executive Order 9786 is a regulation unauthorized by the Lucas Act and is in direct conflict with the expressed terms of the Act and that its intent is reflected in its legislative history."

The language of the Act and of the men who supported this legislation from its inception and who were most responsible for its final enactment and their approval of the language and findings of the courts in *Howard Industries, Inc., v. U. S.*, *Stevens Brown, Inc. v. U. S.* and *Warner Construction Co. v. Krug* cases leave no doubt that the petitioner's request for relief is one which meets the requirements of the Lucas Act.

REPLY TO RESPONDENT'S
POINT III.

Settlement Agreement.

The Respondent's point III concerns itself with the settlement agreement and the validity of Paragraph 204 of Executive Order 9786. There is no doubt that the contention of the respondent is based only upon the language of the invalid regulation, paragraph 204, and has no basis in any of the language itself. Paragraph 204 of Executive Order 9786 is merely an attempt to put back into the Act something that was affirmatively rejected by Congress.

We call the court's attention to a Committee Print dated July 20, 1946 of the 79th Congress, Second Session on S 1477. It was suggested therein that that part of Section 3 of the Act providing that

"a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, shall not operate to preclude further relief otherwise allowable under the Act."

be entirely omitted. It was further suggested in the Committee Print that language be substituted in lieu thereof which would limit claims to cases where the claimant would have been granted relief under the First War Powers Act, 1941, and in which there was no final administration de-

termination prior to August 14, 1945, on such request for relief under the First War Powers Act. The Committee Print also had stricken and omitted Section 6 of the Act which provides for judicial review of claims where the claimant is dissatisfied with the action and decision of any department of the government in either granting or denying his claim.

These suggested limitations and changes were considered by the House Committee at the request of the Attorney General and this is evidenced by two letters dated July 7, 1946, from the Attorney General to the Chairman of the Committee on the Judiciary of the U. S. Senate, Senator McCarran and to the Chairman of the Committee on the Judiciary of the House of Representatives, Representative Hatton W. Summers, and were expressly rejected by the enactment of S 1477 into the Lucas Act as it was submitted and without the adoption of the suggested limitations we have just referred to.

So that we can see that Congress was requested to eliminate that portion of Section 3 which would give relief to claimants notwithstanding a previous settlement and that Congress expressly rejected and refused to adopt these changes and enacted into law Section 3 of S 1477, unchanged and as it was presented to it. Section 204 of Executive Order 9786, however, attempts to put into the law by Executive Order that which Congress expressly repudiated and under the authorities, the law is as stated by the court in *Border Pipeline Co. v. Federal Power Commission*, 171 Fed. 2nd at page 152 (November 22, 1948).

"We cannot write into an Act of Congress a provision which Congress affirmatively omitted."

The argument that the Respondent makes in its point III that the Lucas Act is gratuitous legislation is not supported by these cases which provide for an appeal to the courts. The cases as cited by the Respondent and the

courts below involve legislation in which the administrative agencies were the final authority in the determination of the rights of the claimant. This is not so of the Lucas Act. Appeals are expressly provided for and are provided for on the most liberal terms imaginable. This is provided for in Section 6 of the Act which provides:

"Whenever any claimant under this Act is dissatisfied with a department or agency of the government in either granting or denying his claim, such claimant shall have the right within six months to file a petition * * * *

with the proper court asking for a determination of his claim.

By the passage of the Lucas Act Congress created an obligation where one did not exist before. The case of *Pope v. U. S.*, 323 U. S. 1; 89 L. Ed. 3, adequately establishes our contention in this regard. In that case, the plaintiff had brought a suit in the Court of Claims for additional compensation under a construction contract and had been denied recovery. The Supreme Court denied certiorari. Congress subsequently passed a special Act directing this Court to render judgment upon the claims of the plaintiff upon a different basis of compensation from that considered in the original case. The Court of Claims dismissed the proceedings on the grounds that the special Act was beyond the Constitutional authority of Congress and reversing this position, the Supreme Court held that the Act created a new obligation of the government to pay the petitioner's claim where no obligation existed before and further observed:

"The power of Congress to provide for the payment of debts conferred by Section 8 of Article 1 of the Constitution is not restricted to payment of this obligation which is legally binding on the government. It extends to the creation of such obligations in recognition of claims which are merely moral or honorary."

"Congress by the creation of a legal in recognition of a moral obligation to pay petitioner's claims plainly did not encroach upon the judicial function which the Court of Claims had previously exercised in adjudicating that the obligation was not legal.

"Nor do we think it did so by directing that the Court pass upon petitioner's claims in conformity to the particular rule of liability prescribed by the Special Act to give judgments accordingly (Citing cases)."

We, therefore, can perceive that the execution of a final release or settlement by the petitioner in the instant cause does not bar further recovery under a new cause of action created by Congress. The release and settlement were applicable to such claims or causes of action as may have existed at the time of its execution. It did not, nor could it, apply to a claim that it may have by virtue of Congress imposing on the government a new and legally binding obligation where no such obligation had theretofore been in existence.

Judge Holtzoff, in *Warner Construction Co. v. Krug*, 80 Fed. Supp. 81, in speaking of the Settlement Agreement states:

"Obviously the Congress has the right to waive a release in behalf of the government and it would seem under a liberal construction of this provision that this is just what the Congress did."

It must, therefore, be concluded that Congress, by expressly refusing to omit the provisions which provide that a previous settlement shall not operate to preclude further relief granted by the Lucas Act, intended and determined that the voluntary settlement between the parties herein shall be no bar to such relief from losses as the claimant shall be entitled under the provisions of the Act.

Conclusion.

The clearly stated objectives of the Lucas Act cannot be so misinterpreted or emasculated so as to prevent the granting of relief which Congress intended the petitioner to obtain. The orders and findings of the courts below, therefore, should be reversed and remanded with directions to proceed to grant the petitioner a hearing upon the merits within the purview and intendments of the Act.

Respectfully submitted,

EDWARD L. FOGARTY,

as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation,

SAMUEL F. JACOBSON,

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY
OF THE INLAND WATERWAYS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1949. 1950

No. 5576

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY
OF THE INLAND WATERWAYS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES

We believe that the decision below is correct. However, because that decision is in conflict with decisions of the Court of Claims and because the questions presented by the petition for a writ of certiorari are posed in a great number of pending cases involving large sums of money, review by this Court appears to be warranted.

There are 34 cases under the Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106

Note), involving about \$5,500,500, now pending in the district courts. There are 55 cases, involving over \$11,000,000, pending in the Court of Claims. In well over half of these cases, an issue is presented as to whether the claimant filed the written request for relief from losses by August 14, 1945, which is required by Section 3 of the Lucas Act. About one-third of the cases raise the question whether final action with respect to such a request for relief, or a release of claims, before August 14, 1945, precludes relief under the Lucas Act. The cases raising these latter problems bring into issue the validity of pars. 204 and 307 of Executive Order 9786, and, apart from this Order, the availability of "equitable" Lucas Act relief to a claimant who has entered into a mutual compromise and release. The foregoing questions have produced a number of conflicting decisions in the federal courts.

1. In this case, both lower courts have held that the request for relief from losses, required by the Lucas Act to have been filed before August 14, 1945, must have been a request for the kind of modification without consideration made available by Section 201 of the First War Powers Act (Act of December 18, 1941, 55 Stat. 839, 50 U. S. C. App. 611). The requirement is not met, this decision holds, by invoicees seeking payment for contract extras or by a claim for requisitioned property—either of which would have been enforceable in an

ordinary action without benefit of the First War Powers Act. To the same effect are the decisions in *Jardine Mining Co. v. R. F. C.*, D. D. C., Civil No. 2843-47, May 25, 1948 (unreported); *Davidson v. United States*, 82 F. Supp. 420 (D. D. C.); *Acme Fur Dressing Co. v. United States*, 80 F. Supp. 927 (E. D. N. Y.); *F. G. Vogt & Sons v. United States*, 79 F. Supp. 929 (E. D. Pa.).

The Court of Claims, however, has taken a contrary position, finding sufficient requests for relief in letters requesting redeterminations under contract escalator clauses; in invoices claiming reimbursement for additional expenses; and in an appeal from a contracting officer's termination ruling. *Howard Industries, Inc. v. United States*, 113 C. Cls. 231; *Modern Engineering Co. v. United States*, 113 C. Cls. 272; *Milwaukee Engineering & Shipbuilding Co. v. United States*, 113 C. Cls. 276. *Accord: Stephens-Brown v. United States*, 81 F. Supp. 969 (W. D. Mo.). These decisions—in our view erroneous—have been rendered on Government motions to dismiss. Unreviewable at this time, these denials of motions to dismiss necessitate the lengthy and expensive proofs attending the litigation of matters relating to elaborate contracts and the losses claimed to have been incurred thereunder. A decision by this Court in the instant case might obviate this necessity. It would, at the very least, settle an issue now contested in many of the federal courts.

2. Even if it were held that petitioner meets the requirement of having filed a written request for relief, the decision below could be sustained, we believe, on the alternative grounds that final action was taken on petitioner's claim before August 14, 1945, and that petitioner entered into a mutual compromise and release of its contract claims. Although the court below decided only the question of the adequacy of the request for relief, the district court also sustained the alternative arguments urged by the Government. *Accord: Acme Fur Dressing Co. v. United States, supra; Jardine Mining Co. v. R. F. C., supra.* But here, again, the Court of Claims has announced a contrary rule. That Court has held: (1) that pars. 204 and 307 of Executive Order 9786—denying relief, respectively, to claimants upon whose requests for relief final action was taken before August 14, 1945, or to claimants who would not have been granted relief under the First War Powers Act—are invalid; and (2) that a bilateral agreement resolving claims between the contractor and the Government is no bar to Lucas Act relief. *Howard Industries, Inc. v. United States, supra.* *Accord: Warner Constr. Co. v. Krug*, 80 F. Supp. 81 (D. D. C.), same case, *Warner Constr. Co. v. United States*, 113 C. Cls. 265; *Stephens-Brown, v. United States*, 81 F. Supp. 969 (W. D. Mo.). These conflicting views, like the divergence as to what constitutes an adequate "request for relief," rest ultimately upon

opposing basic assumptions regarding the nature and purpose of the Lucas Act. The fundamental question throughout is whether the Act was designed to afford relief to contractors whose claims might have been granted under the First War Powers Act but for the termination of hostilities, or whether, in the words of petitioner (Pet. 11), the Act "~~is~~ a remedial bit of legislation wholly independent of the First War Powers Act * * *."

Resolution of this problem would expedite or terminate a considerable portion of the suits now pending. Moreover, this Court's conclusion as to the validity of the President's Executive Order, issued pursuant to Section 1 of the Lucas Act, would dispel the uncertainty now present in administrative handling of Lucas Act claims as a result of the Court of Claims and district court decisions holding pars. 204 and 307 invalid.

For these reasons, the United States does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

FEBRUARY 1950.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

**EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY
OF THE INLAND WATERWAYS, INC., PETITIONER**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT**

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 6

EDWARD L. FOGARTY, AS TRUSTEE IN BANKRUPTCY
OF THE INLAND WATERWAYS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the United States District Court for the District of Minnesota, Fifth Division (R. 17-29), is reported at 80 F. Supp. 90. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 36-45) is reported at 176 F. 2d 599.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1949 (R. 46). By order of Mr. Justice Clark, dated November 22, 1949, the time for filing a petition for a writ of certiorari was extended to and including Janu-

ary 20, 1950 (R. 48). The petition for a writ of certiorari was filed on January 20, 1950, and was granted on March 13, 1950 (R. 48). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a claim filed in a bankruptcy court, invoices for contract extras, and a petition for compensation for requisitioned property, constitute "written requests for relief" from "losses" within the meaning of the Lucas Act.
2. Whether requests for relief, disposed of on their merits and released for a consideration before August 14, 1945, may serve as a basis for further relief under the Lucas Act. This includes the question whether paragraph 204 of Executive Order 9786, barring consideration of Lucas Act claims on which "final action * * * was taken on or before" August 14, 1945, is valid.

STATUTE AND EXECUTIVE ORDER INVOLVED

The Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106 note), the amended version of Section 6 of the Lucas Act substituted for the original by Section 37 of the Act of June 25, 1948 (62 Stat. 869, 992), and pertinent portions of Executive Order No. 9786 (3 C. F. R., Supp. 1946, p. 165) are set forth in Appendix A, *infra*, pp. 82-89.

STATEMENT

Petitioner, as trustee in bankruptcy of Inland Waterways, Inc., brought this action under the Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106 note, Appendix A, *infra*, pp. 82-86) seeking to recover losses allegedly sustained by Inland Waterways in the performance of contracts with the Navy Department (R. 1-4). The facts, which are not in dispute, are as follows:

In 1941 and 1942, Inland Waterways, a ~~wartime~~ corporation which was organized for the purpose of obtaining war work (R. 26), contracted to build four submarine chasers and fifty plane rearming boats for the Navy Department (R. 2, 5, 9-10). On December 18, 1942, after partially performing its contracts,¹ Inland Waterways encountered financial difficulties and petitioned in the District Court for the District of Minnesota for reorganization in bankruptcy. Edward L. Fogarty, the petitioner here, was appointed trustee for the bankrupt corporation. (R. 11, 26, 37.)²

¹ Of the fifty plane rearming boats provided for in the contracts, ten were delivered. Two of the submarine chasers were delivered "with certain defects and deficiencies"; the other two were delivered after the contract delivery date "with much uncompleted and defective work which was completed and corrected at the expense of the Government" (R. 11, 26-27, 37-38).

² The court order appointing petitioner also named one Nelson J. Spencer, vice president of the bankrupt corporation, as trustee (R. 11). Less than a month later, however, the court accepted Spencer's resignation and petitioner became sole trustee (R. 12).

Little or no further progress was made in the contract work, and on March 19, 1943, the Government requisitioned the partially completed vessels and the materials which had been acquired for their construction (R. 12). At this time, a number of sums were due to the Government from the corporation, including an unpaid balance on a government-guaranteed bank loan of which the Government had purchased the outstanding principal, unliquidated advance payments, and the cost of finishing incomplete and defective work (R. 12). The corporation, on the other hand, had claims against the Government for such items as unpaid progress payments, contract changes entailing increased costs, and the value of the property requisitioned plus the cost of preserving this property until the time of requisition (R. 12). Both the Government's claims and the corporation's counterclaims were filed in the reorganization proceedings in the District Court (R. 13). In support of the corporation's claims, petitioner submitted copies of a number of unpaid invoices and of a petition to the Navy Department, dated July 23, 1943, in which he had sought compensation for the requisitioned property.³

³ See Exhibit A to petitioner's Lucas Act Claim submitted to the Navy Department, the printing of which was dispensed with by the court below (R. 32-33) and which is filed in its original form as part of the record before this Court. Portions of this material have been printed for convenient reference in Appendix B, *infra*, pp. 90-98.

On February 20, 1945, the Navy Department and the trustee, with the authorization of the District Court for the District of Minnesota sitting in bankruptcy, entered into an agreement settling finally the claims and counterclaims growing out of the bankrupt corporation's construction contracts (R. 9-15). This agreement, reciting the several claims the parties had asserted and pointing out that many of the amounts involved were unliquidated so that the balances due "were not known to the Government or to the Trustee," provided for a net payment of some \$16,000 from the Government to the trustee (R. 12-14). In the concluding article of the agreement the parties mutually released each other "from all debts, dues, sums of money, accounts, reckonings, actions, proceedings, claims and demands whatsoever in law and in equity arising under or as a result of the aforesaid contracts and transactions" (R. 14).

On February 1, 1947, petitioner filed with the Navy Department a claim under the Lucas Act seeking payment for losses claimed to total \$328,804.42 on the contracts which had been the subject of the foregoing settlement (R. 2). Attached as an exhibit to the claim was the counter-claim petitioner had presented in the bankruptcy court. This exhibit, containing the invoices and petition for compensation for requisitioned property with which petitioner had supported its assertions in the bankruptcy court, was described

as including copies "of each written request filed on or before August 14, 1945, with the war agency concerned for relief with respect to the losses claimed" (Lucas Act Claim, p. 2, par. E, Appendix B, *infra*, p. 90). In adjudicating petitioner's claim, the Navy Department's War Contracts Relief Board found that "No request for relief, written or otherwise, except to the extent that the invoices filed might be so considered, were filed by or on behalf of claimant on or before August 14, 1945" (R. 6). The Board concluded, however, that it was "unnecessary to decide whether or not the invoices filed constituted [the] written requests for relief with respect to the losses claimed" required by Section 3 of the Lucas Act. For, the Board held, even if the invoices were treated as the necessary written requests, the agreement of February 20, 1945, containing the trustee's release of all claims in law or in equity against the Government, "constituted final action on the requests made within the meaning of Public Law 657 [the Lucas Act] and Section 204 of Executive Order No. 9786 [Appendix A, *infra*, p. 87]. The War Contracts Relief Board is therefore without authority to consider the claim and denies the same" (R. 7).

Following the Navy Board's decision, petitioner brought the present action pursuant to Section 6 of the Lucas Act (R. 1). On the Government's motion, the district court entered an order granting summary judgment against petitioner (R.

16). In an opinion accompanying this order, the court held that Congress intended in the Lucas Act "to limit consideration to a request for relief from loss under the First War Powers Act which was undetermined on August 14, 1945" (R. 19). The copies of alleged requests for relief upon which petitioner relied "were merely invoices * * * and a claim for allegedly requisitioned property," and were not, the court held, the kind of "request for an amendment to a contract without consideration" contemplated by both the First War Powers Act and the Lucas Act (R. 19-20). Secondly, the court held that paragraph 204 of Executive Order 9786 (forbidding consideration of claims on which "final action" had been taken before August 14, 1945), under which the Navy Board had denied petitioner's claim, was valid and would preclude relief even if the requirement of written requests had been met (R. 20-26). As a third ground for its decision, the court, stressing the fact that it was directed by the Lucas Act to sit as a court of equity, held that the agreement of February 20, 1945, in which the trustee had for a valuable consideration released all claims against the Government, was a bar to the grant of further relief in this action (R. 26-28).

On appeal to the court below, the judgment of the district court was affirmed (R. 46). Agreeing with the district court that the documents upon which petitioner relied could "not be ac-

cepted as written requests for relief from losses * * * within the meaning of the Act" (R. 44), the court deemed it unnecessary to consider the additional bases for the district court's judgment (R. 40).

SUMMARY OF ARGUMENT

I

The purpose, reach, and wording of the Lucas Act—"An Act to authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war"—can only be understood against its background and history. The Act has its roots in the First War Powers Act, 1941, and Executive Order 9001, under which the major war procurement agencies regularly granted contractual relief, as a matter of grace, by means of contract amendments without consideration, raising prices or alleviating contract terms, when it was determined that to do so would "facilitate the prosecution of the war." As this criterion was interpreted, it authorized such relief not only where the contractor's continued production was needed for the war effort but also where fairness, equity, and the consequent encouragement or stimulation of war production required the rectification of such inevitable incidents of wartime procurement as serious (but honest) mistakes and reliance upon technically unauthorized requests or representations of Government officials. Standardized

procedures were established for passing upon contractors' applications for this type of extra-contractual aid—commonly known as "requests for relief"—and many requests were received and regularly disposed of in the period 1942-1945.

But with the surrender of Japan on August 14, 1945, and the ending of hostilities, the War Department and certain other agencies decided that they could no longer certify that such relief would "facilitate the prosecution of the war," except in the case of contractors whose production was needed for post-VJ-day procurement; as of that date these agencies automatically denied the requests of all other contractors, regardless of how long their requests for relief had been pending before VJ-day, what stage of processing the requests had reached, or the contractor's pre-VJ-day connection with, or contribution to, the war effort. Other agencies, of which the Navy was the chief, took the opposite view that the right to relief was not cut off by the ending of hostilities, and continued to process the requests on their merits.

It was this discrimination between (1) contractors whose First War Powers Act requests for relief had been processed before VJ-day and those whose applications were still pending at that time, and also between (2) Army contractors and Navy contractors, which was brought to the attention of Congress and resulted in the introduction and enactment of the Lucas Act. The

committee reports, statements of Senator Lucas, the bill's sponsor, at the hearing and on the Senate floor, and the remarks of Senator McCarran, the Committee chairman, all indicate that the bill's restricted purpose was to repeal the War Department's dictum that the ending of hostilities precluded further grants of First War Powers Act relief, and "to continue the war" for those contractors whose requests pending on VJ-day had been automatically denied without consideration of their merits; the war agencies were now to pass upon these requests as if it were still before VJ-day. This was the bill's aim when it was first introduced, as it came from the Committees, and as it was passed and approved. At no time was there any substantial indication of a broad purpose, unprecedented in our history, to guarantee all war contractors against loss, or of a Congressional desire to provide a special forum for the relitigation of all kinds of legal claims for which suit could be brought in the Court of Claims or the district courts. Congress' sole concern was with the limited class of contractors whose chance to obtain contractual *relief*, as a matter of grace, had been abruptly ended on VJ-day. The President was undoubtedly of the same view, for within two months after approving the bill, he issued presidential regulations (Executive Order 9786), called for by the Act, which admittedly embody this conception of the Act.

Proof of the Lucas Act's intimate connection with First War Powers Act discretionary relief is found not only in its history but also in its very wording and structure. Only agencies empowered to grant War Powers Act relief may grant Lucas Act relief; only contractors who filed "requests for relief"—the special designation for War Powers Act applications—before ~~VJ-day~~ can claim under the new Act; similarly, the statute characterizes awards under the new Act as "relief"; consideration must be given to all prior First War Powers Act and like relief; and, finally, the new Act's phrases "equitable claims" and "fair and equitable settlement of claims" are shorthand expressions directly referring to the unfair discrimination among certain contractors, following the ending of hostilities, which Congress desired to redress, as well as to the facts that War Powers Act relief was not demandable as of right and involved considerations of fair and honorable dealing.

II

Section 3^r of the Lucas Act limits all claims under the statute "to losses with respect to which a written request for relief was filed * * * on or before August 14, 1945 * * *, and one reason why petitioner has no basis for seeking Lucas Act relief is that he cannot fulfill this express requirement. The term "request for relief" has no meaning in procurement practice apart

from the First War Powers Act, and it obviously refers to an application under that statute for contractual relief as a matter of grace. Likewise, the choice of the date "August 14, 1945", in connection with a "request for relief", is explainable only in the light of the special history and purpose we have outlined. So long as the application is one for extraordinary gratuitous relief from losses suffered in the performance of government contracts or subcontracts, no precise form is necessary. But it is plain from the Lucas Act's language and history that this pre-VJ-day filing requirement cannot be satisfied by any sort of written claim or demand for Government monies.

That, however, is just what petitioner is attempting to do. He presents as "requests for relief" from "losses" (a) his objection to the Government's claim and his counterclaim in the District Court reorganization proceeding, (b) a number of contract invoices presented to the Navy, and (c) a claim for just compensation for requisitioned property. None of these is a *request for relief*, in any sense of those words. They are simply demands for payments believed to be legally owing by the Government. Admittedly, they were never considered, or presented for consideration, as First War Powers Act relief applications. They do not differ from the thousands of contractual and non-contractual claims-as-of-right daily filed with the Gov-

ernment, and on which suit is frequently brought. The Lucas Act was certainly not designed to provide substitute tribunals for the consideration of these multitudinous legal demands. Moreover, petitioner's documents, which clearly do not "request relief," also cannot be said to involve "losses." A contractor's demands for payment made under his contract do not normally imply that he has suffered a loss, and petitioner's invoices do not refer in any way to losses (except for a loss of profits, which is unredressable under the Lucas Act). The petition for just compensation fails for the additional reason that it does not even involve a Government contract.

III

Even if the documents filed by petitioner before August 14, 1945, were "requests for relief" from "losses," as the statute prescribes, his claim is barred by the settlement agreement of February 1945, in which he received payment for, and released, these very claims. For paragraph 204 of the President's Lucas Act regulations (Executive Order 9786) provides that "no claim shall be considered if final action with respect thereto was taken on or before" August 14, 1945, and petitioner's challenge to the validity of this rule cannot stand.

A. The regulations embodied in Executive Order 9786 have a special status. The Act expressly conditions the entire process of consider-

ing, adjusting, and settling Lucas Act claims on the presidential regulations it directs to be issued. And since the Act merely authorizes relief "in certain cases"—providing only such general standards as "fair and equitable settlement"—it is clear that the President was empowered to establish not only procedural rules but also more detailed substantive standards and criteria as a precondition to the awarding of relief. Regulations of this type cannot be overturned unless plainly inconsistent with the statute. *Commissioner v. South Texas Co.*, 333 U. S. 496, 503. In addition, Executive Order 9786 has the standing accorded to contemporaneous administrative construction, and the validity of its limiting provisions, such as paragraph 204, must also be judged in the light of the traditional principle that where, as here, Congress grants private benefits doubts must be resolved for the Government and against the private claimant.

B. Against the Lucas Act's history and background, paragraph 204 is seen to be in accord, rather than "plainly inconsistent" with, the statute's purpose and terms. Congress was dealing with the limited problem of contractors whose First War Powers Act requests for relief were pending on VJ-day. It was thought equitable that all such pending requests be processed on their merits and not cut off by the ending of hostilities, as the Army and other agencies had done. There is nothing in the legislative history

suggesting that, at any point, Congress desired reopening of the great mass of First War Powers Act requests for relief which had been disposed of on their merits before VJ-day. Indeed, the history contains an express disavowal of such a purpose by the Chairman of the Senate Committee.

Nor is paragraph 204 inconsistent with the portion of Section 3 of the Act which provides that "a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." This proviso was inserted, we believe, to cover those cases, of which Congress was given a suggestion, where (1) a contractor held several contracts and had previously received relief on some but not others, (2) a contractor had previously received some relief on a contract and later found it necessary to request further relief, or (3) a request for relief had been approved in part but final action was pending as to the rest. The proviso was probably thought advisable to preclude the administering agencies from denying relief automatically in these three types of cases. It was not designed to permit the reopening of a previous grant or denial of the very same request now relied upon by the contractor, and it is not worded in that sense. If Congress had intended to assume the potential liability and to impose the enormous administrative burden called for by

such reopening of all relief requests already determined—as well as to adopt the consequent unprecedented and discriminatory guarantee against wartime losses—it surely would have used plainer language, and the Act's history would contain some indication of that expanded purpose.

C. The statements in the subsequent Congresses to the effect that the President's regulations, and particularly paragraph 204, misconceive the Lucas Act's purpose can have little weight. They sharply diverge from the views expressed in the enacting Congress, and, at the very least, they are neutralized by the President's recent statements, in successfully vetoing two bills designed to embody the same view of the Act as petitioner's, that the Executive Order faithfully carries out the Act's intention as he understood it when he approved the measure.

D. If there should remain any doubt that paragraph 204 is consistent with the Lucas Act, the fact that the regulations were issued by the President should be decisive. Not only does a delegation to the President normally contemplate broad discretionary powers, but the President has had a close connection with the field of gratuitous relief in World War II which gives his Executive Order a special status. Above all, the President who issued the Order in controversy is the President who signed the Act, and the Order was issued within two months of his approving the statute. Only the clearest showing of manifest

error would warrant a finding that the President has misinterpreted and misapplied a statute bearing his own approval and entrusted to him for administration. No such powerful showing has been or can be made here.

ARGUMENT

Underlying the specific issues in this suit is a fundamental divergence of views as to the overall meaning and objective of the Lucas Act. Petitioner's position, as stated in the petition for certiorari (p. 11), is "that the Lucas Act is a remedial bit of legislation wholly independent of the First War Powers Act, 1941, and is intended to go far beyond the relief granted by the First War Powers Act, 1941." The Government, on the other hand, and both lower courts read the Act as being concerned with "claims for losses which a department of the Government could have entertained under section 201 of the First War Powers Act" (opinion below, R. 45), but which were administratively barred following the termination of World War II hostilities on August 14, 1945. The correctness of the latter view is clear, we believe, when the Act is read in the context of its circumstances and of the declarations of legislative purpose preceding its enactment. In the first section of our argument, therefore, we shall review briefly the events leading to, and the legislative history of, the Lucas Act. Against this background, we shall show that the courts below

correctly rejected petitioner's contention that his claim disclosed anything resembling the "written request for relief" from "losses" required by section 3 of the Lucas Act. Finally, even on the assumption that petitioner's purported requests for relief were sufficient, we shall argue that paragraph 204 of Executive Order No. 9786, barring consideration of claims based on requests which had been finally disposed of before August 14, 1945, is entirely consonant with the Lucas Act and affords an additional basis for affirming the judgment below.

I

THE BACKGROUND AND PURPOSE OF THE LUCAS ACT

1. As this Court has had recent occasion to observe, American commitments in World War II created "a demand for production of war supplies in proportions previously unimagined * * * for production in a volume never before approximated and at an undreamed of speed." *Lichter v. United States*, 334 U. S. 742, 763-764. This unprecedented demand, complicated by sudden shifts in war requirements and resulting in the inevitable blocks and dislocations of an economy strained to capacity, led to early realization of a need for sharp departures from peacetime methods of contracting for Government purchases.⁴ Immediately following Ameri-

⁴ See Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944) 44 Col. L. Rev. 127.

ca's entry into the war, Congress, "in order to give the procurement agencies the flexibility they need in the procurement of war matériel" (Sen. Rep. No. 911, 77th Cong., 1st sess., p. 2), enacted Title II, Section 201, of the First War Powers Act (Act of December 18, 1941, 55 Stat. 838, 839, 50 U. S. C. App. 611), empowering the President to—

authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war * * *.

The grant of authority was necessarily broad and unparticularized. It remained for the President to distribute the power, spell out its details, and mark its limitations. This he did in Executive Order No. 9001, 6 F. R. 6787, 3 C. F. R., Supp. 1941, 330, promulgated on December 27, 1941.

Of importance here is the authority granted in Executive Order 9001 (Title I, par. 3) to desig-

nated war agencies,⁵ whenever in their judgment "the prosecution of the war [was] thereby facilitated," to amend or modify contracts "with or without consideration * * *." This authorization constituted a recognition of the fact that the pressure of war and the uncertainties attending new types of production frequently made accurate estimates of costs and production time impossible; that some contractors would probably underestimate their costs and assume ruinous obligations; that the resulting disruption and possible bankruptcy of business enterprises might deprive the Government of essential productive facilities. Cf. *Lichter v. United States*, 334 U. S., at 767-769.⁶ As the Attorney General said in his opinion of August 29, 1942, which became the charter for the war-contracting-agencies' activities under Title II of the First War Powers Act; "In passing the First War Powers Act, the Congress desired to enable you [the Secretary of War], and the contractors who supply you with

⁵ The powers conferred by Executive Order 9001 were originally confined to the War Department, the Navy Department, and the Maritime Commission. Subsequent executive orders (see 50 U. S. C. App., pp. 5730-5733) extended these powers to a number of other agencies.

⁶ The renegotiation legislation sustained in the *Lichter* case was directed, as this Court's opinion made clear, to the converse of the problem dealt with by Executive Order 9001. Because "accurate advance estimates of cost were out of the question" (*Lichter*, at 767), renegotiation and allied measures were deemed necessary to prevent a recurrence of the extravagant profits which had characterized earlier wars.

war matériel, to revise and modify existing arrangements so as to meet the countless dislocations and uncertainties caused by changes in weapons, in strategy, in the economy, in the availability of commodities, and other variables. The extreme scope of the power given by Title II to 'modify' and 'amend' contracts was explicitly recognized in the debate in the Senate. (See Cong. Rec., v. 87, p. 9839.) Title II must be given an interpretation which will carry out the obvious intention of its ~~farmers~~,⁴⁰ Op. Atty. Gen. 225, 233.

Under the authority of Title II and Executive Order 9001, so construed, the contracting agencies—particularly the War and Navy Departments—gave their procurement officials the extraordinary power, in the absence of legally sufficient consideration, to waive the Government's contract rights in proper cases, and to make upward adjustments in contract prices, increase the time allowed for performance, or alleviate the terms and conditions of the contract—adjustments to which the contractor would have had no right as a matter of contract law. Cf. *Saligman v. United States*, 56 F. Supp. 505, 508 (E. D. Pa.).⁴¹ This authority was widely used,

⁴⁰ The Comptroller General had frequently ruled that Government officials had no authority, under their normal procurement powers, to modify a contract to the prejudice of the United States, and "prejudice" was usually construed as financial detriment. E. g. 14 Comp. Gen. 468; 15 Comp. Gen. 25; 18 Comp. Gen. 114, 116; 19 Comp. Gen. 48, 51; cf. *Pacific*

for some three years during the war, to award monetary and other contractual relief as a matter of grace. The major procurement agencies established standard channels and procedures for the processing and scrutinizing of contractors' applications for "First War Powers Act relief," and issued regulations and policy-declarations indicating the categories of cases to which favorable consideration would be given, the types of relief which would be granted, and the character of the proof which would be required.* Broadly inter-

Hardware Co. v. United States, 49 C. Cls. 327, 335; *J. J. Preis & Co. v. United States*, 58 C. Cls. 81, 86-7; *Bausch & Lomb Optical Co. v. United States*, 78 C. Cls. 584, 607; *United States v. American Sales Corp.*, 27 F. 2d 389, 391-2 (S. D. Tex.), affirmed, 32 F. 2d 141, 141-2 (C. A. 5), certiorari denied, 280 U. S. 574. See Kramer, *Extraordinary Relief for War Contractors*, *op. cit. infra*, note 8, at pp. 369-372.

The Attorney General's opinion of August 29, 1942, upheld the power of the agencies to which authority had been delegated under Executive Order 9001 to make such contract modifications without consideration, where it was found that the prosecution of the war would be facilitated. He said of the War Department's initial regulation, which was submitted to him for his opinion: "The quoted provisions are amply sustained by the statute and the President's order. The directive submitted and the examples annexed plainly do not involve the award of any gratuity to the contractor, inasmuch as the proposed modifications or amendments are to be based on findings that the prosecution of the war will thereby be facilitated, thus contemplating a clear benefit to the United States." 40 Op. Atty. Gen., at 233.

* For detailed discussions of the administration of First War Powers Act relief, including examples of the forms such relief took, see Rowley, "The First War Powers Act Cases," in Shepherd, *Cases and Materials on the Law of Contracts* (2d ed. 1946), pp. 1233-1261; Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944) 44 Col.

preting the basic criterion of facilitating the prosecution of the war, the war procurement agencies not only afforded relief where continued production by a contractor was needed for the war effort, but, in the belief that fair dealing would induce increased and speedier production and better cooperation, they also granted relief in many cases of honest mistake, reliance on extra-contractual instructions, representations, or promises by Government officials, or radically changed conditions.⁹ But at all times the fundamental

L. Rev. 127, 194-206; Kramer, *Extraordinary Relief for War Contractors* (1945) 93 U. of Pa. L. Rev. 357; cf. 40 Op. Atty. Gen. 225. The War Department's Procurement Regulations dealing with such relief are found in 10 CFR, Cum. Supp. (1943), secs. 81.308a-81.308g, 81.1252; 10 CFR, 1944 Supp., secs. 803.308a-803.308g, 812.1252; 10 CFR, 1945 Supp., sec. 812.1252. Many of the War Department's supply or technical services (e. g. Quartermaster Corps, Ordnance Department, Corps of Engineers, Medical Department) also issued supplementary directives. The main Navy directives are reprinted in Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 79th Cong., 2d sess., on S. 1477, at pp. 67-75.

It should be noted that, in addition to the granting of contractual relief, Title II of the First War Powers Act and Executive Order 9001 were also authority for the consummation of many types of agreements and contracts which would otherwise be in violation of a specific federal statute (such as the Buy American Act) or contrary to common-law rules of contract. See Fain and Watt, *supra*; 40 Op. Atty. Gen. 225.

⁹ Col. Rowley, formerly Chief, Legal Branch, Office of the Director of Matériel, Army Service Forces, states that it is impossible to list all the types of cases in which the Army granted relief, but that the four main classes were as follows (Rowley, *supra*, note 8, at pp. 1236-8):

object and bounds of this emergency power were announced in the congressional and presidential directives that it was to be exercised only where "such action would facilitate the prosecution of the war * * *." Apart from this overriding consideration, there was no purpose to single out contractors as a special group in the population to be insured against business losses while the rest of the nation made the sacrifices called for by total war. Contractors were, in the language

"1. Where it was necessary to supply additional capital to maintain essential production of required material.

"2. Where the contractor undertook or continued production upon the faith of informal promises or assurances of persons in authority without the protection of a formal contract binding the Government.

"3. Where the terms of the contract as executed by the parties were the result of a mutual mistake or bona fide mistake by the contractor alone as to an existing fact.

"4. Where circumstances unforeseen when a contract was executed resulted in an unfair burden being placed upon the contractor by acts of the Government."

See also Fain and Watt, *supra*, note 8, at pp. 204-205, summarizing the War Department's Procurement Regulations on First War Powers Act relief.

The Navy's directive of July 7, 1943 (see Hearings, *supra*, note 8, at p. 75), emphasizes the continued productivity of essential war contractors, warns against "overwhelming generosity to careless contractors," and adds:

"Third, fair and honest treatment of war contractors will assist in inducing wholehearted cooperation on the part of such contractors, and applications for amendments or modifications without consideration to relieve contractors from *loss* (not merely diminution of anticipated profit) due to obvious errors and mistakes or due to Government action may be regarded with liberality in respect of contractors essential to the war effort." [Italics in original]

of the court below (R. 45) "the incidental beneficiaries of the Act." To emphasize the fact that contract modifications without consideration had in no sense become matters of legal right, applications for such adjustments came to be denominated "requests for relief."¹⁰

2. Following the surrender of the Japanese Government on VJ-day, August 14, 1945, the War Department concluded that no further relief under the First War Powers Act and Executive Order 9001 could be granted "unless the action was required in order to insure continued production necessary to meet post VJ-day requirements." Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 79th Cong., 2d sess., on S. 1477, p. 5. The thought was that, except in the case of contractors whose production was still needed, it could no longer be said that contractual relief would "facilitate the prosecution of the war." Hearings, *supra*, pp. 5-6, 55. Other agencies apparently took the same position. Sen. Rep. No. 1669, 79th Cong., 2d sess., p. 3; H. R. Rep. No. 2576, 79th Cong., 2d sess., pp. 1-2. The result was that, with rare exceptions, contractors who had requested relief before VJ-day, whose requests were still pending and would have been granted but for the cessation

¹⁰ See Rowley, *supra*, note 8, at pp. 1238 *et seq.*, esp. 1238, 1240, 1244, 1254; Fain and Watt, *supra*, note 8, at 194, 197-8.

of hostilities, were denied relief.¹¹ Some of the requests so denied had been pending for extended periods; some had reached the stage of being ready for at least partial authorization and had been delayed only because the full amount to be granted had not been finally determined. See Hearings on S. 1477, *supra*, pp. 8, 9, 13, 17, 18, 20, 21, 33, 39, 48, 55, 59-60, 63. Whether or not this substantial termination of relief after VJ-day necessarily followed from the terms of the First War Powers Act,¹² its effect was obviously a painful blow to contractors who had been given to suppose that they might hope for the Govern-

¹¹ After the Contract Settlement Act of 1944 became effective on July 20, 1944, Section 17 of that statute ("Defective, informal, and quasi contracts") (41 U. S. C. 117), as well as Section 20 (a) (41 U. S. C. 120 (a)), gave the war procurement agencies some independent authority to grant nonlegal contractual relief, which did not terminate with VJ-day. Section 17 was limited in scope, however, and did not cover many of the important requests for relief made by contractors. See Regulation 12 of the Office of Contract Settlement, 32 CFR, 1945 Supp., Secs. 8060.1-8060.9, and Shepherd, *op. cit.*, *supra*, note 8, at pp. 1262-6. (Though it was included in a statute primarily concerned with the settlement of claims under terminated war contracts, Section 17 was not limited to terminated contracts. Section 20 (a) deals mainly with termination matters.)

¹² In his Veto Message on a recently attempted amendment of the Lucas Act (H. R. 3436, 81st Cong., 2d Sess.) discussed *infra*, pp. 68-73, 76-8, the President said: "When hostilities ended on August 14, 1945, a number of Government agencies felt, quite logically, that they could no longer make contract adjustments on the ground that relief so provided 'would facilitate prosecution of the war'" (96 Cong. Rec. (unbound) 9745).

ment's assistance in bearing such risks attending the haste of war production as serious mistakes and reliance upon technically unauthorized requests or instructions of contracting officers. See pp. 21-4, *supra*.

It appeared, moreover, that some agencies, differing with the War Department's view, were taking the position that relief was still available under the First War Powers Act, apparently not limiting such relief to the relatively narrow category of contractors engaged in "production necessary to meet post VJ-day requirements." Hearings, *supra*, pp. 16, 21; 92 Cong. Rec. 9092 (Senators Lucas and McCarran); H. R. Rep. No. 2576, 79th Cong., 2d sess., p. 2.¹³ In short, on the evi-

¹³ In the cited portions of the hearings and congressional debate on the Lucas Act, both Senators Lucas and McCarran pointed to the Navy Department and the Maritime Commission as agencies which, unlike the War Department, were continuing to grant relief. At a later point in the hearings (p. 64), J. Henry Neale, General Counsel for the Navy Department, stated that the "attitude of the Navy is precisely that of the Army with respect to the interpretation of the First War Powers Act." A moment later, however, Mr. Neale pointed out that the Navy was, after VJ-day, denying requests for relief "on the merits" (p. 64), and he expressed the view that one of the cases held to be barred by the Army because hostilities had ended could have been handled retroactively under the First War Powers Act (p. 66). It is not altogether clear, therefore, to what extent the views of the Army and Navy actually differed; it appears probable, however, that the Navy continued to process contractors' requests on their merits, though it denied most of them, while the Army refused even to consider the requests for relief. But the point of present importance is that the

denee before Congress, contractors who were equally deserving, in that the efforts of each of them had previously facilitated the prosecution of the war, were receiving unequal treatment—with grant or denial of relief turning, first, on the seemingly fortuitous circumstance of whether processing of a request had been delayed beyond VJ-day, or, secondly, on the interpretation of the First War Powers Act by the particular agency with which the contractor happened to be dealing. The sole and repeatedly expressed purpose of the Lucas Act was the elimination of these inequalities. See *F. G. Vogt & Sons v. United States*, 79 F. Supp. 929, 931 (E. D. Pa.).

Introducing his bill, Senator Lucas described it as being designed “to amend the First War Powers Act of 1941”, and he expressly referred to the War Department’s view that VJ-day was the cut-off date for relief. 91 Cong. Rec. 9564. Again, at the hearings on the bill, he characterized it as “nothing more or less than an amendment to the original act [First War Powers Act], which would give to the War Department the power to do the very thing they claim that they did not have the power to do.” Hearings on S. 1477, *supra*, p. 17. “Now, all I am trying to do,” he

author of the Lucas Act and the chairman of the subcommittee which studied it, who together shared the task of explaining the bill and urging its passage, both believed that there was a disparity among the agencies in treatment of requests for relief and stressed the resulting inequities as a basis for the proposed legislation.

said, "is 'to continue the war' for these fellows"—*i. e.*, contractors whose requests for relief were pending but not finally acted upon by VJ-day. *Id.*, p. 22.¹⁴ Later, explaining to the Senate the bill, as it was amended by the Senate Committee—which, with a minor and presently immaterial change, became the Act¹⁵—Senator Lucas reiterated these views, and spelled out the difference between the Army and the Navy interpretation of the War Powers Act. 92 Cong. Rec. 9092. And, taking up the explanation immediately following Senator Lucas, Senator McCarran, Chairman of the Senate Judiciary Committee and of the subcommittee in charge of the bill, added (*ibid.*):

¹⁴ The three cases discussed by Senator Lucas at the hearings all involved contractors whose requests for relief were "caught" by VJ-day. See Hearings, *supra*, at pp. 16-17 (Lake States Engineering), 18 (Hanover Mills), 19-21 (Enjay Constr. Co.). These contractors also appeared and made statements (see Hearings, *supra*, at pp. 31-36, 37-45, 46-50); in addition, two subcontractors of Enjay presented their cases (see Hearings, *supra*, at pp. 9, 45-46). Two other contractors wrote letters or made statements which do not indicate the basis of their requests for further legislation, though in the case of one (McGann Mfg. Co.) the VJ-day problem may be involved (see Hearings, *supra*, at pp. 9-10, 11-12, 50-52). The letters or short statements of two other contractors indicate that the passage of VJ-day was probably not the problem concerning them (see Hearings, *supra*, at pp. 10-11, 23-24, 24-26).

¹⁵ The only difference between the bill under consideration by the Senate at this point and the Act as it finally became law was that in the Senate bill the period for which relief might be given began December 7, 1941, instead of September 16, 1940.

Mr. President, let me say that this matter shows the difference between one department which approves and goes forward with adjustments and another department which disapproves and says that after VJ-day it has no right to go forward with adjustments. Those were the two horns of the dilemma. *In other words, one group was paid and another group was not paid; and those who suffered had to come to Congress and obtain specific provision for their relief, as set out in this bill.* [Emphasis added.]¹⁶

This understanding of the bill's purpose was not personal to its sponsor or to its other chief senatorial advocate—though their views are obviously significant—but was adopted and announced by the Judiciary Committees of both houses. In reporting the bill in its final form,¹⁷ these committees stated to the Congress (Sen. Rep. No. 1669, 79th Cong., 2d sess., p. 3; H. R. Rep. No. 2576, 79th Cong., 2 sess., pp. 1-2):

¹⁶ At the hearings, Senator McCarran said:

"* * * I think the only object that we have in allowing you gentlemen as you come in here to state your cases [*i. e.*, representatives of contractors], is to show to the committee the necessity for a clarifying statute, to clarify and make emphatic the things that Congress sought to do when it passed the War Powers Act" (Hearings, *supra*, p. 43).

¹⁷ With the exception, noted in footnote 15, *supra*, that the initial date for the period of coverage in the Senate bill was amended in the House bill, which version was enacted.

This bill [as amended¹⁸] would afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claim would have received favorable consideration under the First War Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government. However, upon the capitulation, the position was taken by certain departments and agencies of the Government involved, that no relief should be granted under the authority which then existed, unless the action was required in order to insure continued production necessary to meet post VJ-day requirements. This was on the basis that the First War Powers Act was enacted to aid in the successful prosecution of the war and not as an aid to the contractors. As a result, a number of claims which were in process at the time of the surrender of the Japanese Government, or which had not been presented prior to such time, were denied even though the facts in a particular case would have justified favorable action if such action had been taken prior to surrender. [Italics supplied.]

The House Committee report also appended Senator McCarran's statement on the Senate floor,

¹⁸ The two bracketed words appear in the Senate report but not in the House report. Otherwise the quoted passage is identical in both reports.

the most important part of which is quoted *supra*, at p. 30.¹⁹

With these repeated explanations before them, and without a word of congressional opposition to the measure,²⁰ both houses of Congress passed,

¹⁹ These highly significant statements, like the statements in the Senate debates, were directed to the bill as amended and as reported by the committees, and not as introduced. The district court's conjecture in *Warner Constr. Co. v. Krug*, 80 F. Supp. 81, 83 (D. D. C.), that "It may well be that some of the statements to which counsel refers had reference to the legislation in its original form" was mistaken insofar as it bore on the debates and the Committee reports. The Court of Claims, which likewise misconceives the Act's legislative history, does not mention the decisive Committee reports or the Senate debates. See *Howard Industries, Inc. v. United States*, 113 C. Cls. 231.

²⁰ Explanatory remarks on the Senate floor covering less than two pages of the Congressional Record (92 Cong. Rec. 9092-9093) comprised the whole of the congressional discussion of the bill.

In contrast with his generally deprecating attitude toward the legislative history of the Lucas Act, petitioner chooses to rely on some statements made by Senator Revercomb at the hearings (Pet. Br., 35-6). But these words are quite ambiguous, and, in the context of the consistent emphasis on the War Powers Act and the special need for a "continuation" statute such as the Lucas Act, they should not, and need not, be read as broadly as petitioner would apparently read them. If, however, Senator Revercomb's statements do bear the construction petitioner puts upon them, it is clear that they were purely individual views. They were neither endorsed by other members of Congress nor embodied in the bill as enacted. They can scarcely be weighed as authoritative against the uniformly contrary statements of the bill's sponsor, the Chairman of the Senate Subcommittee in charge of it, and the Judiciary Committees of both houses. Cf. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494; *Duplex Co. v. Deering*, 254 U. S. 443, 474.

and the President signed, the Lucas Act. It became law on August 7, 1946. On October 5, 1946, the President issued Executive Order No. 9786 (11 F. R. 11553, 3 C. F. R., Supp. 1946, p. 165, Appendix A, *infra*, pp. 86-89) carrying out the Act's mandate (Sec. 1) that the relief it authorized was to be administered "in accordance with regulations to be prescribed by the President * * *." In this Executive Order, the President marked out in detail the limits of the announced congressional objective—to authorize relief from "losses with respect to which a written request for relief was filed * * * on or before August 14, 1945" (Section 3 of the Act), but not acted upon by that date. Petitioner concedes, as he must, that the President's nearly-contemporaneous Executive Order reflects precisely the view of the Act's history and purpose which we have set forth here, and not the view for which petitioner contends. See *infra*, pp. 50-4, 73-80.²¹

3. Legislative history and contemporaneous construction aside, the direct relationship between contractual relief under the First War Powers Act, as a matter of grace, and relief under the Lucas Act is clearly evidenced by the provisions of the latter statute. The first section limits the contracts or subcontracts with respect to which

²¹ See *infra*, pp. 68-73, for discussion of the significance of the various unsuccessful efforts to amend the Lucas Act, in the 81st Congress.

relief is to be available to those involving work "for any department or agency of the Government which prior to [August 14, 1945] * * * was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 * * *." Section 3 provides that the claims to be considered "shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945 * * *"—and "request for relief" is the special term used to describe applications by contractors for the exercise of First War Powers Act authority. See *supra*, p. 25. Section 3 also refers to a "previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944."²² Section 2 requires consideration of "relief granted under section 201 of the First War Powers Act, 1941, or otherwise", and, just as in War Powers Act cases, the statute refers to the awards to be made under the Lucas Act as "relief" (sections 2, 5). The use, in sections 1, 2, and 6, of terms such as "equitable claims," "fair and equitable settlement," and "the equities involved in such claim," reveals a further significant link to the earlier act, for

²² It should be recalled that sections 17 and (20) (a) of the Contract Settlement Act also provided statutory authority for certain limited types of contractual relief. Section 20 (a) is particularly significant here because, by express reference to the War Powers Act, it indicates that the provisions are closely related. See *supra*, note 11, p. 26.

First War Powers Act requests for relief also involved purely "equitable" claims, *i. e.*, claims which were not demandable as of right. At the same time, the principle of "equity" was designed to bring about equality between those contractors whose chance for relief was abruptly cut off *in medias res* on August 14, 1945, and those fortunate enough to have had their applications processed before that date or by other agencies.²³ Because of the ending of hostilities, and also of the War Department's strict interpretation of "facilitate the prosecution of the war," the statute omitted explicit reference to that requirement of the War Powers Act. But inherent in the substituted concept of "equity" was the directive to accord equal treatment to all groups of contractors who had petitioned for First War Powers Act relief before August 14, 1945.²⁴

²³ The principle of "equity" replaced the notion of "manifest injustice," which appeared in the bill as introduced (see Hearings, *supra*, at p. 1), because of the feeling that the latter term was too vague and indefinite. Hearings, *supra*, at p. 27, 43, 58, 59; 92 Cong. Rec. 9092 (Sen. McCarran).

²⁴ Petitioner asserts that there are three differences between the First War Powers Act and the Lucas Act which demonstrate that the relief afforded under the latter is broader. Two of these supposed differences do not exist; the third plainly lacks the significance petitioner attributes to it.

(1) Petitioner points out (Pet. Br. 29-40) that the period for which relief is available under the Lucas Act begins September 16, 1940, while the First War Powers Act was not enacted until December 18, 1941. But the relief authorized by Section 201 of the First War Powers Act applied with respect to "contracts heretofore or hereafter made * * *." The initial date for which relief was available was thus po-

4. Against the decisive weight of the history and statutory language we have summarized to this point, petitioner contends broadly that the President's Executive Order and the views of the courts below are misconceived, that the Act Congress passed and the President signed was wholly different from its description by authoritative congressional spokesmen. The Act, petitioner tentially earlier, rather than later, than that specified in the Lucas Act.

(2) Equally fallacious is the suggestion (Pet. Br. 29) that First War Powers Act relief was not, like relief under the Lucas Act, available to subcontractors. Under the broad authority conferred by First War Powers, relief had been deemed possible for, and had been granted to, subcontractors. See Hearings on S. 1477, *supra*, at pp. 55, 57-58; War Department Procurement Regulations, 10 C. F. R., Cum. Supp. (1943), Sec. 81.248(b); Fain and Watt, *War Procurement—A New Pattern in Contracts* (1944) 44 Col. L. Rev. 127, 203; Kramer, *Extraordinary Relief for War Contractors* (1945), 93 U. Pa. L. Rev. 357, 368, 381.

(3) Nor is petitioner's view of the Lucas Act bolstered by the fact that Section 6 permits a dissatisfied claimant to seek a court determination (see Pet. Br. 44-5). It was thought appropriate to enforce continuance by the agencies of their previously adopted War Powers Act relief standards, despite the cessation of hostilities, through the device of judicial review, and this appears to have been the basis for Section 6, which was written into the bill in committee. See 92 Cong. Rec. 9092-3. But the possibility of review in a court "sitting as a court of equity" effects no enlargement in the substance of a claimant's rights. Section 6 limits the recovery in a court action to an amount "not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act * * *."

See also *supra*, pp. 33-35, and *infra*, pp. 38-40, 50-52, 54-64, 76-79, for further discussion of the similarity between the Lucas Act and the First War Powers Act.

argues (Pet. Br. 3), was designed simply to grant "relief to all contractors, subcontractors, and materialmen who suffered losses on the sum total of all of their war contracts with the Government, without fault or negligence on their part." Building upon the assumption that Congress intended this unique system of indemnity for war contractors, neither related to nor limited by the specific type of relief available under the First War Powers Act, petitioner urges, first, that invoices and a claim for requisitioned property constitute written "requests for relief" from losses within the meaning of the Lucas Act. Secondly, petitioner argues, given his definition of a "request for relief" from loss, the fact that such a request had been acted upon before VJ-day and had been the subject of a mutual settlement of claims with the Government could not operate to preclude the further grant of government funds under the Lucas Act. In this Point, we have shown that petitioner's basic premise—that the Lucas Act is far broader than the First War Powers Act—is false. In the remainder of our argument, we shall prove more specifically, first, that the documents upon which he relies are not "requests for relief" from losses under the Lucas Act, and, secondly, that even if one assumes that a proper request was filed, petitioner is barred from Lucas Act consideration because his pre-VJ-day claim was finally disposed of on its merits before August 14, 1945.

II

PETITIONER, HAVING FAILED TO SHOW THE FILING BEFORE AUGUST 14, 1945, OF A "WRITTEN REQUEST FOR RELIEF" FROM THE CLAIMED LOSSES, HAS NO BASIS FOR SEEKING RELIEF AUTHORIZED BY THE LUCAS ACT

Section 3 of the Lucas Act expressly restricts consideration of claims for losses to those "losses with respect to which a written request for relief was filed with [the] department or agency on or before August 14, 1945 * * *." Appendix A, *infra*, p. 84. Both lower courts have concluded that petitioner's claim failed to disclose anything which could be called the required request for relief from losses. We submit that an examination of the requirement and of the documents claimed by petitioner to fulfill it demonstrates the correctness of that conclusion.

1. As we have seen (pp. 25, 34, *supra*), the term "requests for relief" was the precise term used to describe requests for the unusual assistance—contract modifications, without consideration—available to contractors under the First War Powers Act and Executive Order 9001. It was the refusal by some agencies to grant such requests after August 14, 1945, which led to the Lucas Act. *Supra*, pp. 25-33. Against this background, the conclusion is inescapable that the "written request for relief" required by Section 3 is a request for First War Powers Act (or similar) relief. If there were substance to petitioner's view that the

meaning and purpose of the Lucas Act ought to be divined without reference to its illuminating legislative history, grave difficulty would be encountered in assigning any definite meaning to the unusual statutory phrase "request for relief." Aside from the war period and the War Powers Act, the phrase has no roots in procurement practice, either of the Government or of private parties; its stress on "request," on "relief"—*i. e.*, on grace—is plainly inconsistent with the normal attitude of contractors demanding their rights and satisfaction of a legal claim. And if petitioner's basic argument that the Act was designed as a blanket assumption by the Government of war contract risks were not wholly without support, it would be difficult to know the reason for the requirement that some vague "request for relief" must have been filed before August 14, 1945; both the date and the requirement would be unexplainable. But there is no doctrine of self-imposed blindness which requires the President, the executive agencies, and the courts to guess at the intention of Congress where authoritative expositions of that intention are clear and available. See *Mitchell v. Cohen*, 333 U. S. 411, 417-418; *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479; *United States v. American Trucking Ass'ns*, 310 U. S. 534, 543-544; *United States v. Dickerson*, 310 U. S. 544, 562; *Ozawa v. United States*, 260 U. S. 178, 194; *United States v. Sweet*, 245 U. S. 563. These sources, revealing

the legislative purpose "to continue the war" for contractors whose pending requests for the extraordinary relief authorized by the First War Powers Act had been denied because of the cessation of hostilities (*supra*, pp. 25-33), give intelligibility and precision to the written-request-for-relief provision. They render untenable the view that any sort of written claim or demand for government moneys satisfies the requirement.

2. The documents upon which petitioner relies not only fail to meet the description of "requests for relief" from losses intended by the Lucas Act; they serve also to point up the correctness of our argument that the Act referred to requests for relief under the First War Powers Act. These documents, which are before this Court in their original form and have been printed in illustrative part in Appendix B to our brief (pp. 91-98, *infra*), consist of (1) petitioner's objection to the Government's claim and his counterclaim filed in the proceedings for reorganization of Inland Waterways, supported by (2) a number of invoices presented to the Navy Department for various goods and services and by (3) a claim filed with the Navy Department for reimbursement for requisitioned property.

The first of these, the counterclaim filed in the bankruptcy court, hardly calls for extended argument. It was in no sense a "request" addressed to the Navy Department. It was an invocation of the compulsive powers of the district court

sitting in bankruptcy demanding judgment against the Government. It was "filed with" the Navy Department, not in the statute's obvious sense of being presented to the agency for appropriate administrative action, but only in so far as any pleading is "filed with" an opposing party—a procedure to which the word "filed" is plainly inappropriate. It was, in short, so clearly not the kind of "request for relief" the Lucas Act could possibly have intended that it was not deemed to merit separate discussion by either of the courts below.

Both courts did discuss and reject the contention that the invoices and the petition for payment for requisitioned property served as "written requests for relief" from losses. To reach a contrary conclusion they would have had not only to disregard the purpose of the Lucas Act, but to distort its plain language as well. Invoices and claims for just compensation are demands for payment as a matter of right; only some extraordinary lapse in statutory draftsmanship would explain their having been described in the phrase "request for relief." Moreover, there is no basis for petitioner's contention that the invoices and claim for compensation in this case constitute requests for relief *with respect to contract losses*. The authorization of relief for such losses in specified cases is, of course, the burden of the Lucas Act (Section 1), and the request required to have been filed before August

14, 1945, must have been "with respect to" the claimed losses (Section 3). But the invoices and compensation claim upon which petitioner relies make no mention of losses. Indeed, one of the invoices (Appendix B, *infra*, p. 98) demands payment for "loss" of anticipated profits, an item expressly excluded by Section 2 (a) from consideration under the Lucas Act.²⁵ As the court below observed (R. 44), neither the invoices nor the compensation claim "purport to be a claim for the difference between the contract price for the performance of any of the Waterways contracts and the actual cost to Waterways for such performance, the claim involved in this action and presented to the Navy Department for the first time in February 1947." Nor did the presentation of these demands for payment carry any necessarily implied announcement of "losses," for, turning to the district court's opinion (R.

²⁵ It may be noted, in this connection, that the relief authorized by the Lucas Act is more restricted than that which had been available under the First War Powers Act. The modifications obtainable under the latter statute were not limited to recovery of losses, and some War Department contractors actually recovered expected profits in certain cases. See Rowley, *supra*, note 8, pp. 1251, 1253, 1254. (The Navy apparently did not allow profits (see note 9, *supra*, p. 24).) Only losses "not including diminution of anticipated profits" are allowable under the Lucas Act and these are limited so as not to exceed "the amount of the net loss, * * * on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945 * * *." Secs. 1 and 2(a).

19), "Obviously a contractor may present claims for extras without representing either that he sustained a loss or that he seeks relief from a loss." Equally obviously, the district court points out (*ibid.*); a petition seeking compensation for requisitioned property is not a request for relief from losses incurred in furnishing work, supplies, or services to the Government under a contract, as Section 1 of the Lucas Act requires.

Because they neither "requested relief" nor concerned "losses", the claims upon which petitioner relies here were never, before the present litigation, treated by either the petitioner or the Navy Department as requests for relief from losses. From the time of their assertion to the time of their settlement with the approval of the bankruptcy court (R. 9-15), there was no suggestion that these claims were intended to invoke the Navy's power to grant any relief which would not have been available as of right. Petitioner does not even now claim that, at the time they were presented to the Navy, these documents sought First War Powers Act, or similar, relief. The Navy never had occasion, therefore, to consider petitioner as a potential recipient of such relief. For this obvious reason, the settlement agreement approved by the bankruptcy court (R. 9-15) makes no mention of the First War Powers Act or of Executive Order 9001, as it would have if the Navy had been dealing with a request for

relief. See district court opinion, R. 25; Rowley, *supra* note 8, pp. 1240-1261. Petitioner was obviously pressing legal claims for moneys he considered to be properly owing to Inland Waterways, claims on which suit could be brought. For a contract debt, or to secure compensation for property taken by the Government, the contractor could pursue well-established judicial remedies. 28 U. S. C. 1346 (a) (2), 1491. Extraordinary gratuitous relief under the War Powers Act was unnecessary and irrelevant; it was neither invoked nor considered.

There is not the slightest basis in its history or wording for supposing that the Lucas Act was intended in any way to enlarge, or provide an alternative to, the ordinary legal remedies available to contractors. Every signpost, as we have shown, points the other way. *Supra*, pp. 25-33.²⁶ Indeed, had Congress intended to establish a fresh review of legal-claims-as-of-right, there would have been neither reason nor meaning in requiring a showing that a "written request for relief" from losses had been filed before August 14, 1945. With accidental exceptions, every contractor presents written invoices to the Government and every businessman whose prop-

²⁶ In addition to the other factors we have mentioned, it should be noted that many of the legal claims would be barred by the statute of limitations, or, as in the instant case, released for a valuable consideration, and to permit their renewed presentation would be an extraordinary, unmentioned, and unexplained bounty.

erty has been taken files a claim for compensation. Moreover, claims as of right cannot well fit into the category of "losses" until they are finally acted upon, since no loss can exist until the claim is denied in whole or in part. Such claims still pending on VJ-day would, therefore, not involve "losses," as Section 3 of the Act requires. In these circumstances, petitioner's interpretation would, at best, make of the filing requirement little more than superfluous verbiage—and ill-chosen verbiage at that, since, as we have pointed out, petitioner suggests no explanation why Congress should have misdescribed contract and just compensation claims as "requests for relief" from "losses." Actually, however, the quoted language, adopted from administrative usage under the First War Powers Act, aptly describes the kind of request for relief without consideration which had been made administratively allowable by that Act and to which, in our view, Congress gave continued efficacy after August 14, 1945, by the Lucas Act. The writings upon which petitioner relies bear no remote relationship to such a request, and petitioner does not claim that they do.²⁷

²⁷ Executive Order 9786 does not contain an explicit definition of "request for relief," but it implicitly embodies the definition we urge. In paragraph 307, it provides (*infra*, p. 89):

"307. Relief with respect to a particular loss claimed shall not be granted under the Act and these Regulations unless the war agency considering the claim finds, or, in case such

3. This conclusion entails no disagreement with petitioner's argument that no precise form is necessary to constitute a request for relief. As petitioner points out (Pet. Br. 17), the executive agencies in determining the sufficiency of alleged requests under the Lucas Act have not imposed any formal tests,²⁸ and we argue for none here. No special form is required, and there are no prescribed words which must appear in the request for relief. The only essential is that the document must show that it is an application for extraordinary gratuitous relief from losses suffered in the performance of Government contracts or subcontracts.

Petitioner is in error, however—as, we believe, are the lower court decisions upon which he relies—when he reasons from the absence of formal requirements to the absence of any significant requirements at all. For reasons urged above, we believe the Court of Claims, and some district courts, have misread the language and history of the Lucas Act when they conclude that such writings as invoices for contract extras, re-

loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945."

²⁸ See, e. g., *Milwaukee Engineering and Shipbuilding Company*, CCH Government Contracts Reporter, 4 CCF par. 60,452 (Navy Department War Contracts Relief Board), reversed, 113 C. Cls. 276; *E. Totonelly Sons*, 4 CCF, par. 60,823 (Army War Contract Hardship Claims Board).

quests for redeterminations under contract escalator clauses, or appeals from contracting officers' termination rulings constitute requests for relief within the meaning of the Lucas Act. *Howard Industries, Inc. v. United States*, 113 C. Cls. 231; *Modern Engineering Co. v. United States*, 113 C. Cls. 272; *Milwaukee Engineering & Shipbuilding Co. v. United States*, 113 C. Cls. 276; *Stephens-Brown v. United States*, 81 F. Supp. 969 (W. D. Mo.); *Pittston-Luzerne Corp. v. United States*, 84 F. Supp. 800, 801 (M. D. Pa.); cf. *McGann Mfg. Co. v. United States*, 83 F. Supp. 957 (M. D. Pa.). Judge Whitaker, dissenting from these Court of Claims decisions (113 C. Cls. at 243, 275, 279), the courts below, and a number of district courts (*Davidson v. United States*, 82 F. Supp. 420 (D. D. C.); *Acme Fir Dressing Co. v. United States*, 80 F. Supp. 927 (E. D. N. Y.); *F. G. Vogt & Sons v. United States*, 79 F. Supp. 929 (E. D. Pa.); *Jardine Mining Co. v. R. F. C.* (D. D. C., unreported), Civil Action No. 2843-47, May 25, 1948) properly recognize the distinction between a claim as of right and a "request for relief" from losses. It is not insistence on form to say that the request contemplated by the Lucas Act must at least have (1) indicated in some way that the extraordinary power under the First War Powers Act and Executive Order 9001 to grant amendments without consideration was being invoked, and (2) referred to some described loss or losses. Neither of these minimal require-

ments is met by the documents asserting rights to payment upon which petitioner relies here. They are not, however liberally the language and purpose of Congress is construed, "requests for relief" from losses.²⁹

III

EVEN IF THE DOCUMENTS FILED BY PETITIONER BEFORE AUGUST 14, 1945, WERE REQUESTS FOR RELIEF FROM LOSSES, PARAGRAPH 204 OF EXECUTIVE ORDER 9786, BARRING RELIEF WHERE FINAL ACTION WAS TAKEN ON SUCH REQUESTS BEFORE AUGUST 14, 1945, IS VALID AND PRECLUDES THE PRESENT CLAIM

The Navy Department War Contracts Relief Board, while indicating that petitioner's purported requests for relief were probably insufficient (R. 6, 7), found it unnecessary to decide this point. Paragraph 204 of Executive Order 9786, issued pursuant to the Lucas Act, provides that "no claim shall be considered if final action with respect thereto was taken on or before" August 14, 1945. *Infra*, p. 87. The Board held that the mutual compromise of February 20, 1945 (R. 9-

²⁹ In Point III, in connection with the finality of pre-VJ-day dispositions of "requests for relief," we spell out certain arguments which are also applicable to the construction of the term "request for relief" itself: (1) the deference due to contemporaneous administrative construction; (2) the special respect due to the President's Executive Order, which inferentially incorporates the view we urge, and to his views on the Lucas Act; and (3) the accepted rule requiring interpretation of bounty legislation in the Government's interest, in case of doubt. See *infra*, pp. 50-54, 59 (fn. 33), 66-80.

15), in which petitioner received payment for, and executed an unconditional release of, the claims now asserted, constituted final action within the meaning of paragraph 204 and barred relief under the Lucas Act. This conclusion, accepting *arguendo* petitioner's erroneous contention that the documents he relies upon were requests for relief, was approved by the district court (R. 20-29) and serves as an independent and sufficient basis for sustaining the judgment below.³⁰ For petitioner's attack upon the validity of paragraph 204 is without merit. The Act plainly envisages the promulgation of Presidential regulations limiting and prescribing the occasions for, and the type of, relief to be granted; and this particular provision of the regulations contravenes neither the Act's words nor its purpose.³¹

³⁰ The Court of Appeals found it unnecessary to pass upon this point (R. 40). Two other district courts have agreed with the district court below that paragraph 204 is valid. *Jardine Mining Co. v. R. F. C.*, D. D. C., Civil No. 2843-47, May 25, 1948 (unreported); *Acme Fur Dressing Co. v. United States*, 80 F. Supp. 927 (E. D. N. Y.). Two district courts and the Court of Claims have held paragraph 204 to be invalid. *Warner Constr. Co. v. Krug*, 80 F. Supp. 81 (D. D. C.); *Stephens-Brown v. United States*, 81 F. Supp. 969 (W. D. Mo.); *Howard Industries, Inc. v. United States*, 113 C. Cls. 231, 239 *et seq.*; *Warner Constr. Co. v. United States*, 113 C. Cls. 265. See also *Prebilt Co. v. United States*, 88 F. Supp. 588 (D. Mass.).

³¹ Much, though not all, of the argument in this Point III is also applicable to the issue of what is a proper "request for relief" from "losses," discussed in Point II. See note 29, *supra*, p. 48.

A. To begin with, the Lucas Act shows by its very terms that the presidential regulations it requires are to comprise much more than the simple prescription of forms and procedures. Woven into the Act as a prerequisite to the granting of any relief at all, the regulations are necessary to spell out the details of the limitations and conditions which are indicated, but not fully defined, by the general statutory language. Section 1 provides that the departments and agencies to which the Act applies "are hereby authorized, *in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act*, to consider, adjust, and settle equitable claims of contractors * * *" (*infra*, p. 82. [Italics supplied.] The regulations are thus expressly directed to govern the three steps of consideration, adjustment, and settlement of the claims, and are not designed to be merely procedural, mechanical, or formal.

Secondly, despite petitioner's attempt to read it as a legislative mandate for governmental assumption of war contractors' risks, the Act is, on its face, no more than an *authorization* to settle claims of a *restricted type*. The title declares the statute to be one "To *authorize* relief *in certain cases* where work, supplies, or services have been furnished for the Government under contracts during the war." 60 Stat. 902 (*infra*, p. 82). [Emphasis added.] As we have already pointed out (*supra*, pp. 33-35, 38-40), Sections 1, 2,

and 3 define the authorization and spell out the "certain cases" to which the Act applies by reference to (a) the departments or agencies authorized "to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941," (b) "equitable claims" and "fair and equitable settlement of claims", (c) "losses * * * incurred between September 16, 1940, and August 14, 1945, without fault or negligence * * *," (d) the filing of a "request for relief" prior to VJ-day, and (e) action taken, or relief granted, under other legislation. Finally, Section 2 (a) provides that the amount of a contractor's net loss on all his contracts or sub-contracts with the agencies involved should constitute an upper limit on the relief authorized—not, it should be emphasized, an amount required to be granted.

It is obvious, we think, from the character of these specific provisions, as well as from the entire structure of the Act, that the President was granted broad power to establish more detailed standards and criteria for the awarding of relief. His role was not limited to dotting i's and crossing t's. It was necessary, for example, to give some content to the general terms "equitable claims" and "fair and equitable settlement." Clearly, these provisions could not be explained by reference to "equity" in its technical, legal sense, for the claims authorized were not derived from, or related to, claims recognized by courts

of equity. Nor was it apparent that the word "equitable" was used to describe a general moral obligation; it was at least questionable whether, in a period of almost universal sacrifice, the Government acquired an ordinarily unrecognized ethical duty to heal the financial wounds of those who had lost money on Government contracts through no demonstrable fault or negligence of their own. In short, these were terms the meaning and scope of which it was necessarily open to the President to define, specify, or circumscribe. Similarly, the provisions of Section 3 (*infra*, pp. 83-84) respecting the prior filing of a "written request for relief" and "previous settlement" are certainly not so precise and exact that the President was precluded from defining them and prescribing more detailed rules. On the contrary, that was the very function expressly vested in him by the opening section of the Act (*supra*, p. 50), and the challenged paragraph 204 of the Executive Order represents a careful exercise of that power.³²

³² The Attorney General's letter of March 5, 1946, to Senator McCarran (reprinted at p. 2 of Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 79th Cong., 2d sess., on S. 1477) observed: "The President would be empowered to prescribe regulations to further the purpose of the legislation. *The enactment of the measure would afford, therefore, an additional criterion for the determination of those claims.*" (Italics supplied.) This was written about the bill as originally introduced, before its amendment by the committee, but the change in language (e. g. from "manifest injustice" to "equitable" claims) would

In these circumstances, it is apparent that for several reasons petitioner's attack must fail unless he proves the plainest inconsistency between paragraph 204 and the Lucas Act. Where Congress has particularly intended an administrator to have broad rule-making powers by conditioning rights or benefits on rules prescribed by him, his regulations "should not be overruled by the court unless clearly contrary to the will of Congress." *Commissioner v. South Texas Co.*, 333 U. S. 496, 503. Added to this principle is the settled rule that a contemporaneous construction of a statute by those charged with its administration "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States v. Jackson*, 280 U. S. 183, 193; *Edward's Lessee v. Darby*, 12 Wheat. 206, 210; *United States v. Philbrick*, 120 U. S. 52, 59; *Fawcett Machine Co. v. United States*, 282 U. S. 375, 378; *Billings v. Truesdell*, 321 U. S. 542, 552-553; *Commissioner v. South Texas Co.*, *supra*, 501. And both of these rules acquire special force where Congress plays the role of benefactor. For it is another "familiar rule that where there is any doubt as to the meaning of a statute which 'operates as a grant of public property to an individual, or the relinquishment of 'public interest,'

not affect this comment. See note 23, *supra*, p. 35, *infra*, pp. 55-56. The Committee reports (*supra*, p. 30) do not fail to take note of this delegation to the President in describing the bill as amended.

the doubt should be resolved in favor of the Government and against the private claimant." *Northern Pacific R. Co. v. United States*, 330 U. S. 248, 257, and cases cited. Likewise, the breadth of discretion in issuing regulations depends to some extent on the subject matter (*Hamilton v. Dillin*, 21 Wall. 73, 92-93; *United States v. Antikamnia Co.*, 231 U. S. 654, 666), and gratuity legislation must be read from that viewpoint. There can be no dispute, of course, that in the Lucas Act, as in the Dent Act which followed World War I, "Congress was seeking to save the beneficiaries from losses which it would have been under no legal obligation to make good if a private person. It was a gratuity based on equitable and moral considerations." *Work v. Rives*, 267 U. S. 175, 181.

B. In establishing the subordinate standards and criteria contemplated by the Lucas Act, the President was directly guided by the most fruitful sources available to him—the Act's purpose and legislative history. Far from being "plainly inconsistent" with either the purpose or the history of the statute, paragraph 204 of the Executive Order clearly accords with both.

1. It will be recalled that, as we have shown in Point I (*supra*, pp. 25-33), the situation which led to the Lucas Act was the refusal by some agencies to grant relief under the First War Powers Act after VJ-day on the ground that the cessation of hostilities had made impossible findings that

such relief would facilitate the prosecution of the war. This refusal led to two forms of discrimination which were deemed inequitable by Congress: (1) between contractors whose requests for relief had been disposed of by VJ-day and those whose requests were still pending on that date; and (2) between contractors dealing with agencies like the War Department, which refused relief after VJ-day, and those dealing with agencies taking the opposite view. Repeatedly—in the hearings, in floor discussion, and in the committee reports—the bill which became the Lucas Act was described as affording relief to the class of contractors who had been refused rulings on their requests after VJ-day. *Supra*, pp. 28-32.

It was to this class of contractors alone that the interest of Congress was directed when it authorized the consideration of "equitable claims * * * for losses * * *." The language of Section 201 of the First War Powers Act, authorizing contract modifications without consideration when "such action would facilitate the prosecution of the war," had been thought insufficient to warrant relief for these contractors. And so, as originally introduced, S. 1477 authorized amendments without consideration after VJ-day where "necessary to prevent a manifest injustice * * *." Hearings on S. 1477, p. 1. The phrase "manifest injustice" was criticized as being too vague (*id.*, pp. 58-58, 60; see note 23, *supra*, p. 35), and, along with numerous other

changes designed "to limit it in every respect and to protect it in every respect" (92 Cong. Rec. 9092, Senator McCarran), the bill was amended to provide for settlement of "equitable claims * * * for losses * * *." While this change may or may not have effected some improvement in terms of precision, there is not the slightest evidence that it was intended to alter the focus of congressional concern. There was no indication that Congress was dissatisfied with the administration of relief under the First War Powers Act prior to VJ-day or that the Lucas Act was designed to remedy any supposed injustice to contractors whose requests for relief had been granted or denied on their merits. Indeed, when the possibility of reopening requests for relief already determined administratively was mentioned at all, it was mentioned only to be rejected. In the Hearings on S. 1477, there appears the following significant colloquy between Senator McCarran, Chairman of the Subcommittee on the bill, and J. Henry Neale, General Counsel for the Navy Department (pp. 64-65):

The CHAIRMAN. I do not understand that the idea of the bill is to direct payment of something that was turned down on its merits.

Mr. NEALE. I quite understand, Senator.

The CHAIRMAN. I do not think the Congress of the United States will want to inject itself into a judgment on the merits, on the facts. I think the Congress, if it

will want to do anything, will want to so clarify the law that as to the just and equitable case that seems to be precluded from judgment by reason of the condition that has arisen, the condition will be removed so that its merits may be considered. I think that is all the Congress will want to do.

Numerous statements revealing the same limitation were before the President when he issued, in Executive Order 9786, the regulations required by the Lucas Act. See pp. 28-32, *supra*. To repeat only one of these, the Judiciary Committees of both houses had explained that the bill was designed simply to "afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claim would have received favorable consideration under the First War Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government." Sén. Rep. No. 1669, 79th Cong., 2d sess., p. 3; H. R. Rep. No. 2576, 79th Cong., 2d sess., p. 1, *supra*, p. 31. Reading the Lucas Act in the light of such declarations, the President had every reason to believe that the Act was to be confined to its stated purpose. He had no reason to believe that, without apparent need and with no discussion of so drastic a step, Congress intended to require reconsideration, at contractors' demands, of the mass of requests for

relief of which final disposition had been made during the war.

We submit, then, that when the terms of the Lucas Act are read in the context which explains their significance, it becomes clear that paragraph 204 of Executive Order 9786 accords completely with the congressional purpose in barring claims "if final action with respect thereto was taken on or before" VJ-day. If it had omitted this limitation, the Order could have been charged with ignoring one of the meanings Congress had sought to convey in confining the Act to "equitable claims" as to which "requests for relief" from losses had been filed prior to VJ-day. It would have countenanced the expansion of a relatively uncontroversial authorization of relief for a narrow class of claimants into an unprecedented and discriminatory vehicle for taking business losses out of war. For on petitioner's view that the Order should have prescribed reconsideration of requests for relief denied before August 14, 1945, the Act would become an extraordinary guarantee against over-all losses on war business, and at the same time would purposelessly discriminate against war contractors who filed requests or claimed losses after August 14, 1945.

2. Petitioner contends, however, that paragraph 204 is invalid because Section 3 of the Act, after stating the requirement of a written request for relief filed before August 14, 1945, adds the proviso that "a previous settlement under the

First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act." *Infra*, p. 84. Whatever plausibility this argument has when the quoted clause is first read disappears when the language is examined more closely in the context and framework of the Act as a whole. It then becomes apparent that this single terminal clause was not inserted to contradict and reverse the numerous authoritative statements of congressional purpose, that it was not intended to permit reopening of requests for relief which had been disposed of finally and with unconditional releases of all future claims against the Government.³³

Both the Lucas Act and the President's Executive Order recognize the possibility that a claimant who had already received relief under the First War Powers Act might have had occasion to request and receive further relief under that Act. This was possible (1) where a contractor held several contracts and had received relief on some but not on others, (2) where a contractor

³³ It bears repetition here that the agreement involved in this case was not, in any event, made "under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 * * *." See pp. 5, 43-4, *supra*. It follows that the proviso in Section 3 of the Lucas Act, whatever its meaning, would have no application to the present case. This is, however, simply a further illustration of the fact that petitioner's claim must fail because of his inability to show the filing of a written request for relief before August 14, 1945. See Point II, *supra*, pp. 38-48.

had received some relief on a contract and later found it necessary to request further relief, or (3) where a request for relief had been approved in part and final action was still pending as to the rest. Congress realized that some contractors in these categories undoubtedly had requests for relief pending when the shooting war ended. Accordingly, provision was made in Section 2 (a) of the Lucas Act that, in considering claims for losses, the agencies were to take into account, with respect to "all contracts and subcontracts held by the claimant," "relief granted under Section 201 of the First War Powers Act, 1941, or otherwise * * *" (*infra*, p. 83). This directive is repeated in paragraph 303 of Executive Order 9786, which also provides, in paragraph 101.8, that the contract price used in determining a contractor's loss should include "any amounts paid or payable pursuant to any amendment, adjustment, or settlement * * * under the First War Powers Act * * *," (*infra*, p. 88).

Thus, the Executive Order as well as the Act contemplate the granting of relief to claimants who had requests pending on VJ-day, despite the fact that they might have received prior relief on earlier requests or on a portion of their pending requests. The terminal clause upon which petitioner relies was intended, we submit, merely as a congressional warning against the view that a contractor who had once received relief under the First War Powers Act was

thereby precluded from the receipt of further relief, on requests still pending, under the Lucas Act.³⁴ It cannot be construed, however, to mean that a request under which relief had already been granted or denied—which had been disposed of finally and completely during the war and was no longer pending on VJ-day—may now be revived and made the basis for the bestowal of additional relief. The clause does not provide that “a previous settlement under the First War Powers Act *of the same request now relied upon* shall not operate to preclude further relief under this Act.” It says instead that “a previous settlement under the First War Powers Act * * * shall not operate to preclude further relief *otherwise allowable* under this Act.” As the district court held (R. 24), “‘Further relief otherwise allowable’ means consistent with the basic objectives of the Act.” It means that a claim for losses on one contract is not barred by final action on another before VJ-day, and that a fresh request, filed prior to VJ-day, on a contract which had either been amended or considered for amend-

³⁴ In view of the direction, in Section 2 (a), to “consider” all previous “relief granted under Section 201 of the First War Powers Act, 1941” and any previous action taken under the Contract Settlement Act of 1944, the Congress may well have included the terminal clause of Section 3 in order to preclude the President or an agency from construing this Section 2 direction to “consider” such previous action or relief as authority to deny relief automatically to claimants who had previously received awards under either of those Acts, but who still had requests pending.

ment before, may be considered under the Lucas Act.³⁵ It does not mean that the limited group of contractors with which Congress was concerned was suddenly and inconspicuously expanded, in a proviso, to create a mass of claimants, an administrative burden of potentially impossible proportions,³⁶ and a liability without visible limits. In short, it "does not revive requests which had been disposed of by VJ-day" (District Court opinion, R. 24).

³⁵ There is especially good reason for believing that Congress had in mind the case of a contractor whose request for relief had been approved in part before August 14, 1945, but the remainder of whose request for relief was pending as of that date. On the floor of the Senate, Senator Lucas described such a case at length (92 Cong. Rec. 9092) as "one example of how important this matter is to the small contractors who were caught in between when VJ-day came." The last clause of Section 3 may have been prompted by this case, or a similar one.

³⁶ The task of reviewing all the war contracts of claimants who had filed requests for relief during the war, including those whose requests had been granted or denied finally, would obviously have been staggering. Cf. Hearings before a Subcommittee on the Judiciary, United States Senate, 81st Cong., 1st sess., on S. 873 and H. R. 3436, p. 60. Such a review is necessary, of course, in order to determine in accordance with Section 2 (a) of the Lucas Act "the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945 * * *." See also par. 101.11 of the Executive Order (*infra*, p. 87). Even the lesser task of reviewing and rehearing the hundreds of individual First War Powers Act relief cases handled between 1942 and 1945 would be enormous.

It is true that, as introduced, S. 1477 provided that "this section shall not be applicable to cases submitted under section 201 of the First War Powers Act, 1941, which have been finally disposed of under such section upon their merits prior to August 14, 1945." See Petitioner's Brief, pp. 41-2. But the omission of this clause in the bill as passed, after the language of the bill had been "carefully redrafted so as to limit it in every respect and to protect it in every respect" (92 Cong. Rec. 9092, Senator McCarran), does not aid petitioner. In its original form, the bill was couched in terms of a presidential authorization to departments and agencies to amend or modify contracts whenever necessary to prevent a "manifest injustice." Under this blanket authority relief might have been given without regard to whether a written request for relief from losses had been filed with the agency concerned before VJ-day. Section 2 of the bill as introduced simply extended until July 1, 1946, the time for filing "claims or requests for action," and the doors were thus opened to all types of claims, including those never previously presented and those already passed upon. It was appropriate to write into this broad authorization an express exclusion of requests disposed of before VJ-day. The bill as passed, however, was limited to losses from which relief had been requested by VJ-day. In the light of the intervening legislative history, the pattern of the Act

as it evolved, and the use of "equitable" and "equities" in the sense of nondiscrimination against claims pending on VJ-day, it was no longer necessary to include the special proviso which had appeared in the original bill.

Even if the stress on "equity" had not referred to the special discrimination with which we think Congress was plainly and solely concerned, it seems incredible to suppose that dead claims like the one asserted here, once mutually compromised and paid for by the Government, were intended to be revived as "equitable claims" under the Lucas Act. If the terminal clause of Section 3 were construed to reopen any requests for relief which had already been determined on their merits, it would be necessary, at the very least, to construe the term "previous settlement" in Section 3 as applying only to a unilateral administrative determination and not to the present type of bilateral agreement accompanied by a complete release. "The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due." *Illinois Surety Co. v. United States*, 240 U. S. 214, 219. And, unless the words "equity" and "equitable" were to be read out of the Lucas Act, petitioner's view of Section 3 would have to be qualified by defining the word "settlement" in accordance with the usage referred to by Mr. Justice Hughes in the quoted sentence from

Illinois Surety Co. v. United States. For it is difficult to perceive the "equity" in a claim like petitioner's which, in its demand for double payment, is manifestly inequitable in any sense of the word. See note 46, *infra*, p. 80.

We believe, however, that the terminal clause of Section 3 calls for no consideration of the distinction between unilateral and bilateral settlements. The interpretation of that clause embodied in the President's Executive Order is, we submit, entirely correct in refusing to read the clause as reviving requests for relief disposed of before VJ-day. This interpretation gives ample scope to the clause without stretching beyond recognition the avowed purpose of the Lucas Act, without devitalizing the words "otherwise allowable," and without having an excepting clause control the whole body of the Act and unsettle closed transactions for no stated reason in policy or justice. Paragraph 204 of the Executive Order simply heeds the repeated admonition that the intention of Congress "is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will." *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 93-94; *Holy Trinity Church v. United States*, 143 U. S. 457, 462; *United*

States v. Katz, 271 U. S. 354, 357; *United States v. Ryan*, 284 U. S. 167, 175. Moreover, "a liability in any case is not to be imposed upon a government without clear words"; *Pine Hill Co. v. United States*, 259 U. S. 191, 196. Where, as here, the asserted liability is unprecedented and potentially enormous, and appears never to have been contemplated by Congress, "only the plainest language could warrant a court in taking it to be imposed" (*Ibid.*; *United States v. Zazove*, 334 U. S. 602, 617, reversing 162 F. 2d, 443 (C. A. 7), cited at Pet. Br. 43-4); and words of that character cannot be found in the Lucas Act. Petitioner's view, on the other hand, requires that the terminal clause of Section 3 be stripped of part of its language, lifted from its context and history, read with the improbable premise that this single terminal clause was intended to dissociate the "bounty altogether from the motive which actuated Congress in granting it * * *" (*Allen v. Smith*, 173 U. S. 389, 402), and construed in a manner directly opposed to the dominant canon in the interpretation of gratuity legislation.

C. Petitioner also seeks to bolster his view of Section 3 (as well as his argument as to what constitutes a "request for relief") by citing statements made in later Congresses which have differed with the President's Executive Order and the President's views of the Lucas Act. The short answer to this argument is that these later statements diverge not only from the President's

construction but also from the views expressed by the Congress which actually enacted the statute.

1. Section 37 of the Act of June 25, 1948 (62 Stat. 869, 992, Appendix A, *infra*, p. 85-6)³⁷ amended Section 6 of the Lucas Act to confer jurisdiction upon the Court of Claims, leaving jurisdiction of suits up to \$10,000 in the district courts. Reporting this provision, Senate Report No. 1559, 80th Cong., 2d sess., included the following sentence (p. 14):

Public Law No. 657 of the Seventy-ninth Congress [the Lucas Act] provides for the determination of war claims incurred without fault or negligence *where any form of contract relief had been requested during the war and despite former administrative denial or settlement thereof.* [Emphasis added.]

Petitioner's reliance upon this sentence is plainly misplaced. The amendment under consideration when the sentence was written dealt only with procedure. It neither affected, nor was affected by, the scope of the substantive rights conferred by the Lucas Act. The statement was thus unnecessary and unimportant. It was, moreover, flatly contradictory of the Act it purported to describe. The volunteered comment that the Act provided for claims "where any form of con-

³⁷ The Act of June 25, 1948, was the general statute amending and revising Title 28 of the U. S. Code.

tract relief had been requested during the war" ignores the express requirement of Section 3 that a written request for relief from losses must have been filed.

2. In the second session of the Eighty-first Congress, both houses passed H. R. 3436, a bill which would have broadened considerably the benefits conferred by the Lucas Act. 96 Cong. Rec. (unbound) 8407, 8779. Among other things, the bill would have amended Section 3 of the Act to read:

Claims for losses shall not be considered unless filed with the department or agency concerned on or before February 7, 1947, and unless a written request for relief, or a demand for payment of such losses, or a notice of such losses, sustained or impending, adequate under the circumstances to apprise such department or agency of the distress of the contractor was filed or submitted to such department or agency or to any of its subordinate officers on or before August 14, 1945; but a previous settlement, regardless of its nature, under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, or other final action on a request for relief shall not operate to preclude further relief otherwise allowable under this act. A request for relief, or a demand for payment of losses or a notice of such losses, sustained or impending, adequate under the circumstances to apprise

such department or agency of the distress of the contractor which had been submitted to or filed with a prime Government contractor by a subcontractor, or with a subcontractor by a sub-subcontractor, prior to August 14, 1945, shall constitute a proper and sufficient request for relief within the terms of this act. The form of the request for relief hereunder shall be immaterial, provided it inform the Government or the dominant contractor that a loss was being suffered, was anticipated, or had been suffered by the contractor, subcontractor, or sub-subcontractor in connection with the work in question. [Emphasis added to mark changes.]

H. R. 3436 was vetoed (96 Cong. Rec. (unbound) 9745) (*infra*, pp. 76-78), and no attempt was made to override the veto.³⁸ Thereafter, Congress passed another bill, S. 3906, in the stated belief that this revised measure met the President's objections to the previous bill. This bill, too, was vetoed (96 Cong. Rec. (unbound) 13143) (*infra*, pp. 78-79); the Senate, by a vote of 39 to 30, refused to repass the bill over the President's veto (96 Cong. Rec. (unbound) 14871), and

³⁸ The legislative history of H. R. 3436 includes the following materials: H. R. Rep. No. 422; Sen. Rep. No. 1632; 95 Cong. Rec. 5440; 96 Cong. Rec. (unbound) 8405-8407, 8778-8779, 9745-9746; Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 81st Cong., 1st sess., on S. 873 and H. R. 3436.

the Lucas Act remains unchanged.³⁹ It thus becomes unimportant to consider whether the amendments, had they been enacted, would have

³⁹ The legislative history of S. 3906 includes the following: Sen. Rep. No. 2052; H. R. Rep. No. 2782; H. R. Rep. No. 2704 (on a companion measure, H. R. 9121); 96 Cong. Rec. (unbound) 10124, 11223-4, 12085-6, 13143, 14865-71.

The pertinent provisions of S. 3906 are as follows:

"Be it enacted, etc., That the act of August 7, 1946 (Public Law No: 657, 79th Cong., ch. 864, 60 Stat. 902), as amended (sec. 37 of the act of June 2 , 1948, ch. 646, 62 Stat. 869, 992), is hereby amended by adding the following section thereto:

"SEC. 7. Within the limitations stated in this act and no others—

* * * *

"(2) notwithstanding anything in section 3 of this act with reference to the necessity of a request for relief filed on or before August 14, 1945, claims otherwise payable under this act shall be allowed to the extent that they include losses with respect to which in a writing submitted to a department or agency concerned on or before August 14, 1945, the claimant (a) requested relief, available under the First War Powers Act, (b) demanded payment thereof, or (c) gave notice of such sustained or impending loss; but nothing in this paragraph shall be taken to limit or exclude other requests for relief otherwise sufficient under section 3 of this act;

"(3) claims otherwise payable under this act as amended shall include those of subcontractors on the same basis as the claims of prime contractors if the request for relief, demand for payment, or notice of sustained or impending loss required by section 3 of this act or defined by paragraph (2) of this section was submitted in writing by such claimants on or before August 14, 1945, to either (a) a department or agency concerned, or (b) the prime contractor or other subcontractor involved."

helped petitioner.⁴⁰ What does merit comment is the fact that, in connection with H. R. 3436 and S. 3906, the view was expressed in Congress that Executive Order 9786 did not properly carry out the intention of the Lucas Act. H. R. Rep. No. 422, 81st Cong., 1st sess., p. 1; Sen. Rep. No. 1632, 81st Cong., 2d sess., pp. 1, 3, 6; 96 Cong. Rec. (unbound) 8406 (all on H. R. 3436); Sen. Rep. No. 2052, 81st Cong., 2d sess., pp. 1-2; H. R. Rep. No. 2782, 81st Cong., 2d sess., p. 1; H. R. Rep. No. 2704, 81st Cong., 2d sess., p. 1;⁴¹ 96 Cong. Rec. (unbound) 10124, 11224, 14865, 14868-9, 14870. These statements in the Eighty-First Congress now interpret the Lucas Act as having intended broader relief than the First War Powers Act had afforded. The interpretation underlying paragraph 204 of Executive Order No. 9786, barring relief on requests which had been finally disposed of before V.J.-day, is asserted to be erroneous.

⁴⁰ It may be noted in passing, however, that, even under the sweepingly liberal terms of these bills, it is improbable that the documents upon which petitioner relies would qualify as requests for relief, a demand for payment of losses, or a notice of losses. See Point II, *supra*, p. 40 *et seq.*

⁴¹ It is significant, however, that H. R. Rep. No. 2704 specifically states (p. 1) that "It was not and is not the intent of Congress to permit the reopening of decided claims under" the First War Powers Act and the Contract Settlement Act.

The important point here, however, is that the opinions expressed in a later Congress on which petitioner relies are irreconcilable with the descriptions of the Lucas Act by the Congress which passed it. They find their own refutation in the legislative history of the Act as it is recorded in the hearings, the Committee reports, and the Congressional Record. See pp. 25-33, *supra*. They cannot serve now to effect radical changes in the unequivocal statements of legislative intent which guided the Congress in passing the Act, and the President both in approving the Act and in issuing regulations under it.⁴² Cf. *United States v. Mine Workers*, 330 U. S. 258, 281-282; *Hartford Electric Light Co. v. Federal Power Comm.*, 131 F. 2d 953, 964 (C. A. 2), certiorari denied, 319 U. S. 741. Had they accompanied the original bill, these congressional opinions, now several years removed, would, of course, have influenced the regulations. But they also would probably have prevented the adoption of the Act. See *supra*, p. 69, and note 45, *infra*, pp. 76-79. To endow them today with any retroactive significance as against the President's contemporaneous regulations, issued in the light of sharply different congressional sentiments, would serve in effect

⁴² It is even doubtful to what extent these statements reflect the considered views of the 81st Congress, since the two unenacted bills passed both houses without objection and with almost no discussion; after the President's veto of S. 3906, a majority of the Senators voting (39-30) refused to repass the measure. 96 Cong. Rec. (unbound) 14871.

to enact the amendatory legislation the President has disapproved.

Moreover, these expressions of opinion in the 80th and 81st Congress are effectively neutralized, at the very least, by the President's explicit and categorical statements, in his two recent veto messages, that he construed the Lueas Act, at the time he gave it his approval, very differently from the way in which the sponsors of the amendatory bills now say that they interpreted it, and that he then relied on the legislative history of the Act as we have set it forth in Point I, *supra*. See *infra*, pp. 76-79. And unlike the later Congressional declarations to which petitioner refers, the President's recent statements are fully in accord with the statements made in Congress at the time the Lueas Act was being considered, as well as with the Executive Order issued two months after the Act became law.

D. This reference to the President's views brings us to a factor which we have thus far barely touched upon in our discussion of the validity of paragraph 204 of the Executive Order but which we believe to be of capital significance—that it was the President who issued the regulation now challenged by petitioner. If any doubt remains, that crucial fact should sharply turn the scale. For the President's unique position endows his Executive Order with a special strength.

One can start with the basic double proposition that a delegation to the President often contemplates somewhat wider discretionary powers than a similar grant to a subordinate, and also that exercises of delegated powers by the President will less readily be overturned by the courts. Cf. *Hamilton v. Dillin*, 21 Wall. 73, 92-3. See *supra*, p. 53. In this case, there must be added the historical fact that the Lucas Act deals with an area of government procurement which had originally taken shape as an administrative mechanism evolved by the executive departments and agencies under presidential directives. For the specific idea of granting contract modifications without legal consideration cannot fairly be attributed to Congress. It was, in fact, a device which made its first appearance in Executive Order 9001, 3 C. F. R., Supp. 1941, p. 330 (Title I, par. 3), as an exercise of the broadly stated grant of power in Section 201 of the First War Powers Act "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * * without regard to the provisions of the law relating to the making * * * of contracts * * *." See *supra*, pp. 18-25.

Thus, when the end of the war brought what Congress deemed a discriminatory refusal of relief to some contractors by some agencies, and Congress enacted the Lucas Act "to afford a means of considering, adjusting and settling equitable claims of the contractors affected" (Sen.

Rep. No. 1669, 79th Cong., 2d sess., p. 3; H. R. Rep. No. 2576, 79th Cong., 2d sess., p. 2), the statute simply removed a block to a program which had long since been set in operation by the President. The benefits made possible by the statute were appropriately declared to be available, as had been the case under the First War Powers Act, only "in accordance with regulations to be prescribed by the President * * *"—explicitly recognizing and confirming the President's special position in World War II in the field of gratuitous contractual relief.

Above all, in the case of the Lucas Act, there is also the further significant fact that the President who issued the Executive Order in controversy is the President who signed the Act, and that the Order was issued within two months of his approval of the statute.

For the President, in addition to his role as executive, plays a vital part in the legislative process, and his contemporaneous views on approving a measure must be considered along with the Congressional materials. Cf. *Edwards v. United States*, 286 U. S. 482, 490; *Lynch v. Dept. of Labor and Industries*, 19 Wash. 2d 802, 810-811.⁴³ Where contemporaneous presidential regu-

⁴³ Indeed, as time and events have molded the shape of American government, students of its operation have come increasingly to the view that the President is more "Chief Legislator" than "Chief Executive." McBain, *The Living Constitution*, p. 117, and, generally, pp. 115-120, 122 (1928); Curwin, *The President: Office and Powers*, c. VII (3d ed., 1918).

lations are attacked as inconsistent with the statute by which they are authorized, the attack ordinarily implies that the President has clearly mistaken the meaning of a law in the enactment of which he had a prime share, and which probably would never have been enacted without his signature.⁴⁴ It is especially pertinent to note the extreme character of this assumption in the present case, since there is the most substantial evidence in the two recent veto messages—for the belief that the President would not have approved the Lucas Act had he supposed that the limitations spelled out in Executive Order 9786 were not intended by Congress,⁴⁵ and it is most unlikely that such a veto would have been overridden. This is not to suggest that, be-

⁴⁴ Corwin, *op. cit. supra*, at pp. 342-343, finds from "the testimony of statistics" that "the President's veto is normally effective in nine cases out of ten."

⁴⁵ (1) In his veto message on H. R. 3436, 81st Cong., 2d sess., which would have extended relief to claimants whose requests for relief under the First War Powers Act had been disposed of before VJ-day and would otherwise have broadened the scope of the Lucas Act (see pp. 68-69, *supra*), the President referred to the limited purpose of the Lucas Act as he understood it and declared (96 Cong. Rec. (unbound) 9745-9746):

"I cannot accept the contention that the purpose of the War Contractors Relief Act [Lucas Act], which H. R. 3436 would amend, was other than to provide a basis for relief to those contractors whose cases would have been handled under the First War Powers Act if war had not ended. Had I believed there was a broader purpose, I would not have issued the kind of regulations which were promulgated in Executive Order 9786. These regulations were a faithful attempt to interpret the language of the act as affording

cause a significant element of the legislative will is his own, the President has power to thwart that will in the exercise of his duties as Chief Executive. Cf. *Corwin, op. cit. supra*, note 43; p.

nothing more than a statutory basis for the continued processing of written applications for relief under the First War Powers Act which were pending and undisposed of on August 14, 1945. * * *

"H. R. 3436, and the reports recommending its enactment, would radically change the basic purpose of the original War Contractors Relief Act. I believe that in spite of any administrative interpretation which might be made to limit the effects of the bill, its provisions not only require reconsideration of all claims originally filed, but might also be construed to permit reopening of an unknown number of cases settled under the First War Powers Act and the Contract Settlement Act. * * *

"When [the element of interest as an added item of cost], relaxation of requirements for filing notice, liberalization of relief beyond that afforded by the First War Powers Act, and the specific exclusion of finality of settlement under the First War Powers Act and the Contract Settlement Act are all added together, I believe that the net effect of this bill, for all practicable purposes, would be to write into law the principle of Government insurance against all wartime net losses incurred by contractors providing goods and services to the Government.

"In my *veto* message on H. R. 834, Eighty-first Congress, a bill 'To amend the Contract Settlement Act of 1944,' I stated that the implications of acceptance of such a principle 'are profound, both with respect to our finances and with respect to our free-enterprise system.' I stated further, 'In my opinion, it would be a serious error to introduce at this time a new principle—insurance against war-caused losses. This would involve reopening the entire program of financing the war, with incalculable effects upon our finances.' These quotations are equally applicable in the case of this bill. If this principle should ever be accepted for those who had

344. It is to urge only that nothing less than a powerful showing of manifest error would warrant a finding that the President has misinter-

contracts with the Government, I would see no basis for withholding its extension to thousands upon thousands of other persons who suffered in producing for the war effort without contracts."

(2) In his later message vetoing S. 3906 (*supra*, pp. 69-70), the President said (96 Cong. Rec. (unbound) 13143, August 21, 1950) :

"While it is evident that an attempt has been made to adopt certain of the clarifying amendments to the War Contractors Relief Act which I suggested [in his veto message on H. R. 3436, *supra*], it is likewise evident that no attempt has been made to limit their scope to claims or requests for relief that would have been granted under the First War Powers Act of 1941 but for the termination of hostilities with Japan on August 14, 1945. Indeed, the committee reports negative the possibility of any such restricted interpretation of the amendments. The bill, moreover, would not preclude the reopening of an indeterminate number of cases that have been settled under the First War Powers Act or the Contract Settlement Act of 1944.

"In the absence of these limitations, the provisions of the present measure and their legislative background are quite sufficient to accomplish what I consider to be a total departure from the intent and scope of the War Contractors Relief Act. I refer particularly to the proposed 'definition of a request for relief' in paragraph (2), which greatly relaxes the existing requirement that claims be founded upon a specific application for the extraordinary relief which was allowable under the First War Powers Act, and to the similar language in paragraph (3) relating to the claims of subcontractors.

"It was not the purpose of the First War Powers Act to relieve contractors because of loss, or to indemnify them against loss. On the contrary, that act authorized the granting of relief because it would assist in obtaining needed war production and thereby 'would facilitate the prosecution of the war.' In my opinion, the sole objective of the War Con-

preted and misapplied a statute bearing his own approval and entrusted to him for its administration.

No such showing has been or can be made here. Paragraph 204 of Executive Order 9786 embodies the President's conviction that neither he nor the Congress had intended in approving the Lucas Act to reopen closed transactions under the First War Powers Act and to permit all contractors who had sought (and frequently received) financial relief without consideration to invoke a new "principle of Government insurance against all wartime net losses incurred by contractors providing goods and services to the Government." Veto Message on H. R. 3436, 81st Cong., 2d sess., 96 Cong. Rec. (unbound) 9745, 9746, June 30, 1950. That conviction was supported by the circumstances and declarations of congressional purpose leading to the Lucas Act. It was wholly consistent with the statutory scheme and terms in which Congress announced its objective. It ac-

tractors Relief Act was to afford a basis for the continued processing of those relatively few requests for First War Powers Act relief which were still pending on August 14, 1945, and could not be handled by the war agencies after that date without additional statutory authority. I am plainly supported in this opinion by the legislative history of the War Contractors Relief Act, to which I expressly invite the attention of the Congress (S. Rept. No. 1669, H. Rept. No. 2576, 79th Cong.; 92 Cong. Rec. 9092)."

The President then went on to refer to his prior veto message on H. R. 3436, and to quote some of the portions set forth above.

corded with the traditional caution with which legislative bounties to private individuals are viewed in our law. Neither petitioner's out-of-context textual arguments nor his mixed bundle of later Congressional statements (*supra*, p. 71) can destroy these weighty supports for the President's regulation. We submit, therefore, that petitioner's claim, already paid for by the Government, falls outside the purview of the Lucas Act and was correctly denied under paragraph 204 of Executive Order 9786.⁴⁶

⁴⁶ Even if paragraph 204 of the Executive Order is invalid, the judgment below may be affirmed on the independent ground (aside from the absence of a proper "request for relief") that Inland Waterways' voluntary release (for an adequate consideration) of all its claims against the Government, in the agreement of February 1945 (R. 14), necessarily deprives its present claim of all equity, and the claim must therefore be denied on the merits under Sections 1, 2, and 6 of the Act. The District Court took this position (R. 28).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below should be affirmed.

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OCTOBER 1950.

APPENDIX A

The Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106 note) provided:

AN ACT

To authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where work, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers' Act, 1941 (50 U. S. C., Supp. IV, app., see, 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. Settlement of such claims shall be made or approved in each case by the head of the department or agency.

concerned or by a central authority therein designated by such head.

SEC. 2. (a) In arriving at a fair and equitable settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant under which work, supplies, or services were furnished for the Government between September 16, 1940, and August 14, 1945, and shall consider with respect to such contracts and subcontracts (1) action taken under the Renegotiation ~~Act~~ (50 U. S. C., Supp. IV, app., sec. 1191), the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, sec. 101-125), or similar legislation; (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise; and (3) relief proposed to be granted by any other department or agency under this Act. Wherever a department or agency considering a claim under this Act finds that losses under any such contract or subcontract affected the computation of the amount of excessive profits determined in a renegotiation agreement or order, and to the extent that the department or agency finds such amount was thereby reduced, claims for such losses shall not be allowed under this Act.

(b) Every claimant under this Act shall furnish to the department or agency concerned any evidence within the possession of such claimant bearing upon the matters referred to in subsection (a) of this section.

SEC. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months

after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, but a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act.

SEC. 4. Appropriations or funds available for work, supplies, or services of the character involved in the respective claims at the time of settlement thereof shall be available for payment of the settlements: *Provided*, That where no such appropriations are available, appropriations for payment of such settlements are hereby authorized.

SEC. 5. Each department and agency shall report to the Congress quarterly the name of each claimant to whom relief has been granted under this Act, together with the amount of such relief and a brief statement of the facts and the administrative decision.

SEC. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claims; and, upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by

the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision of the court as in other equity cases.

2. Section 37 of the Act of June 25, 1948 (62 Stat. 869, 992), revising 28 U. S. C., amended Section 6 of the Lucas Act to provide:

Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims or, if the claim does not exceed \$10,000 in amount or suit has heretofore been brought or is brought within thirty days after the enactment of this amendatory act, with any Federal district court of competent jurisdiction, asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled (not exceeding the amount which might have been allowed by the department or agency concerned under the terms of this Act) and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court; and thereafter either party may appeal from the decision if it was rendered by a district court or petition the Supreme Court for a writ of certiorari if it was rendered by the Court of Claims, as in other cases. Any case heretofore brought in a district court under this sec-

tion may, at the election of the petitioner to be exercised within thirty days after the enactment of this amendatory Act, be transferred to the Court of Claims for original disposition in that court.

3. Executive Order No. 9786, dated October 5, 1946 (3 C. F. R., Supp., 1946, p. 165), issued pursuant to the Lucas Act, provides in pertinent part:

PART I—DEFINITIONS

101. As used in these Regulations—

* * * * *

101.3 The term "war agency" means any department or agency of the Government which, prior to August 14, 1945, was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 * * *

* * * * *

101.8 The term "contract price" means the aggregate of all amounts (before taxes and statutory renegotiation) paid or payable to a contractor or subcontractor for work, supplies, or services furnished during the statutory period pursuant to a contract or subcontract, including any amounts paid or payable pursuant to any amendment, adjustment, or settlement of or on account of such contract or subcontract under the First War Powers Act, 1941, the Contract Settlement Act of 1944 (41 U. S. C., Supp. IV, secs. 101-125), or otherwise.

101.9 The term "loss" means the amount by which the cost of performance of a contract or subcontract exceeds the contract price thereof.

* * * * *

101.11 The term "net loss" means the amount by which the aggregate of the costs of performance under all contracts and sub-contracts exceeds the aggregate of the contract prices under all contracts and sub-contracts, after giving appropriate effect to action in renegotiation proceedings in respect of the statutory period.

* * * * *

PART II—FILING OF CLAIM

201. No claim shall be received or considered by any war agency unless properly filed in accordance with the Act and these Regulations on or before February 7, 1947.

202. Each claim shall be in writing and shall contain or shall be accompanied by:

* / * * * *

e. A copy of each written request filed on or before August 14, 1945, with the war agency concerned, for relief with respect to the losses claimed.

f. A copy of any other written request filed prior or subsequent to August 14, 1945, with any agency for relief with respect to the losses claimed.

g. A statement of any other relief sought from the Government with respect to the losses claimed.

* * * * *

204. No claim for loss under any contract or subcontract of a war agency shall be received or considered unless a written request for relief with respect thereto was filed with such war agency on or before August 14, 1945; and no claim shall be considered if final action with respect thereto was taken on or before that date.

* * * * *

PART III—SETTLEMENT OF CLAIMS

* * * * *

303. Each war agency, in considering a claim, shall take into consideration (a) action taken with respect to the claimant under section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, the Contract Settlement Act of 1944, or similar legislation; (b) relief granted the claimant under section 201 of the First War Powers Act, 1941, or otherwise; and (c) relief proposed to be granted the claimant by any other war agency under the Act. Whenever a war agency finds that a loss affected the computation of the amount of the claimant's excessive profits determined in a renegotiation agreement or order, and to the extent that the war agency finds such amount was thereby reduced, no claim for such loss shall be allowed under the Act or these Regulations. Each war agency, in considering a claim, shall give such regard as may be proper to any reduction in income or excess profits taxes of the claimant resulting from the loss in respect of which the claim is made.

304. No claim shall be allowed by any war agency except if and to the extent that the war agency finds that the claim is (a) equitable under all the circumstances and (b) for losses incurred without fault or negligence on the part of the claimant.

305. No claimant shall be granted relief under the Act and these Regulations in any amount in excess of the amount of the net loss (less the amount of any relief granted subsequent to the establishment of such loss) on all contracts and subcontracts held by the claimant pursuant to which work,

supplies, or services were furnished for the Government during the statutory period.

307. Relief with respect to a particular loss claimed shall not be granted under the Act and these Regulations unless the war agency considering the claim finds, or, in case such loss was incurred under the contracts and subcontracts of another war agency, such other war agency finds, that relief would have been granted under the First War Powers Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945.

308. Where a claim is settled by agreement between the war agency and the claimant, the agreement shall be reduced to writing and signed by both parties and shall include an unconditional release by the claimant of all claims whatsoever of the claimant against the Government or any department or agency thereof as to all contracts and subcontracts involved in consideration of the claims. Payment, within the limits of appropriations available for such purposes, shall be made by the war agency upon the basis of the executed agreement.

309. Where a claim is not settled by agreement, the war agency shall deliver to the claimant a written statement as to the amount, if any, due on the claim, but shall make no payment of any amount so found to be due until the claimant shall have delivered to the war agency an unconditional release of all claims whatsoever of the claimant against the Government or any department or agency thereof as to all contracts and subcontracts involved in consideration of the claims.

APPENDIX B

Petitioner's claim submitted to the Navy Department for relief under the Lucas Act, together with documents in its support, is before this Court in its original form, its printing having been dispensed with by the court below (R. 32-33). Portions of this claim and supporting documents are printed here for convenient reference.

I. The claim itself reads, in part, as follows:

Edward L. Fogarty, as Trustee in Bankruptcy of the Inland Waterways, Inc., a corporation, respectfully requests relief under an act passed by the 79th Congress, being public law # 657 and entitled "An act to authorize relief in certain cases where work, supplies, or services have been furnished for the Government under contracts during the war", and in support thereof submits the following information:

A. The total loss sustained for which payment is sought is in the sum of \$328,804.42.

B. [Here follows a list of the contracts involved and the amount of loss claimed to have been sustained on each.]

* * * * *

E. Copies of each written request filed on or before August 14, 1945 with the war agency concerned for relief with respect to the losses claimed are attached hereto as Exhibit A.

F. No other written requests were filed subsequent to August 14, 1945.

G. No other relief was sought from the Government with respect to the losses

claimed other than that as may have been had in proceedings for the re-organization of the claimant under Chapter X of the Acts of Congress relating to Bankruptcy in the District Court of the United States for the District of Minnesota, Fifth Division, Case # 6976.

* * * * *

J. & K. The loss sustained was through no fault or negligence on the part of the claimant. The claimant corporation performed all of the covenants and agreements on its part to be performed with reference to the contracts hereinabove referred to. The Government, however, wrongfully withheld payments due and owing the claimant on the said contracts and failed and refused to pay the claimant's loan through the Federal Reserve Bank which the Government was obligated to do, in failing to furnish certain materials that the Government was obligated to furnish and in numerous and varied change orders directed to be made by the Government from time to time during the construction of the vessels contracted for. That various expenses were necessitated by reason of said change orders and insistence by local inspectors as to methods of handling and launching ships.

* * * * *

II. Exhibit A referred to in paragraph E, *supra*, contains a document petitioner had filed on May 18, 1944, in the proceedings in the United States District Court for the District Court for the District of Minnesota, Fifth Division, for reorganization in bankruptcy of Inland Waterways, Inc. This document, entitled "Trustee's

Objection to Allowance of the Amended Claim of the United States of America, and the Amended Counterclaim of Said Trustee," reads in part as follows:

Edward L. Fogarty, as trustee in this proceeding, hereby objects to the allowance of the amended claim of the United States of America by the court in the within proceeding as set forth in the amended proof of debt made by Frank L. Yates, Assistant Comptroller General of the United States, for and in behalf of the United States of America, made on the 22nd day of December, 1943, and in the sum of \$36,546.16.

That said objection is made on the following grounds, namely:

(1) That Inland Waterways, Inc., debtor in the within proceedings, is not indebted to the United States of America in the sum of \$36,546.16 plus interest, as certified in transcript of General Accounting Office, Settlement No. US-11000 dated December 6, 1943, affixed to its said amended proof of debt. That said trustee for its amended counterclaim herein alleges as follows:

(2) That said claimant, United States of America, is indebted to Inland Waterways, Inc., debtor in the within proceedings, and its said trustee, in the sum of \$113,875.35, as shown by a statement thereof hereto attached, marked Exhibit A and made a part hereof, and also in the additional sum of \$274,791.28, as shown by a statement thereof hereto attached, marked Exhibit B and made a part hereof, or a total sum of \$388,666.63. That there are no offsets or counterclaims to the same in favor of said United States. That such indebtedness arose through and out of cer-

tain transactions had by debtor corporation with the United States, acting through its Department of Navy, and as set-offs and counterclaims thereto, and for affirmative relief against said United States, the trustee hereby alleges the facts to be as follows:

[The factual allegations, here omitted, describe the contracts of Inland Waterways with the United States, allege full performance by Inland Waterways, and assert claims for extra work and materials, for payments withheld, for partially completed boats which had been requisitioned, etc.]

* * * * *

That by reason of the facts set forth in the foregoing Paragraphs 16 and 17 hereof, the debtor corporation, its creditors and its trustee have suffered damages as follows:

- (a) For loss of profits, \$15,000.00.
- (b) For loss by diminution of value of such remaining property, \$120,079.28.
- (c) For rendering it impossible to perfect a reorganization of debtor corporation as contemplated, \$25,000.00.

* * * * *

(18) Wherefore the trustee demands judgment as follows:—

- (a) That the amended claim of the United States be disallowed.
- (b) That the amended counterclaim of the trustee be allowed.
- (c) For such other and further relief as to the court may appear just and proper.

III. Also accompanying petitioner's Lucas Act claim was a petition for compensation for requisitioned property which petitioner had filed with

the Navy Department on July 23, 1943, and which had been filed in the District Court in support of the foregoing objection and counterclaim. The body of this petition reads as follows:

To the Claims Unit, Navy Order Section:

The undersigned petitioner asserts the following claim with respect to compensation for requisitioned property:

(1) The full name and address of the petitioner is as follows: Edward L. Fogarty, Duluth, Minn., Trustee of Inland Waterways, Inc., a corporation, organized under the laws of the State of Minnesota.

(2) The property with respect to which the claim is asserted is as follows: Supplies and materials pertaining to contract NXs3309, for 40-33 foot plane rearming boats, see exhibit "A" attached hereto.

(3) The interest of the petitioner in the property at the time of requisitioning was as follows: Petitioner was appointed Trustee of said Inland Waterways, Inc., on Dec. 19, 1942, by the U. S. District Court at Duluth, Minn., in reorganization proceedings of said company under Chapter 10 of the Acts of Congress relating to Bankruptcy, Certified copies of appointment hereto attached.

(4) Petitioner alleges that he was the sole owner of such property at the time and place of the taking and that said property is free and clear of liens (except as specifically stated in paragraph 5 hereof) and that all taxes and charges assessed against said property have been paid.

(5) The petitioner knows of no other person, firm or corporation having or claiming any interest in the requisitioned property or in compensation therefor except as follows: Except as noted in Exhibit "C".

(6) The petitioner alleges that fair and just compensation for the property requisitioned is \$35,466.00, and that the basis upon which such claim is computed is as follows: Inventory and appraisal thereof by the Assistant Supervisor of Shipbuilding, U. S. N. at Duluth, Minn., and confirmed by the Bureau of Ships, Navy Department, Washington, D. C.

(7) The petitioner states that neither his claim nor any interest therein has been sold, pledged, assigned or otherwise disposed of except as follows:

(8) The petitioner claims that he is entitled to the following amount of compensation: \$35,466.00, as a fair and reasonable value of the property requisitioned, and the following additional sums incurred by petitioner in the care and conservation of said property from December 26, 1942, the date of cessation of operations at the plant of Inland Waterways, to and including May 20, 1943, the date of the final delivery of the property to Dumphy Boat Corporation of Oshkosh, Wisconsin. Such sums were necessary to comply with the demands of the Assistant Supervisor of Shipbuilding at Duluth, Minn., with reference to furnishing of guards for the protection of said property, and accommodations and conveniences for said guards, namely:

Insurance. The following policies were obtained at the request of the Assistant Supervisor of Shipbuilding at Duluth, Minn., with a loss clause payable to the U. S. Navy and were in force until said property was delivered to the Dumphy Boat Corporation with premium charges as follows:

Pacific Fire #330, \$5,000, on boats, materials and equipment	\$50.65
Agricultural #87485, \$5,000, on boats, material and equipment	50.65
Alliance #1037, \$5,000, on boats, materials, and equipment	50.65
Great American #6538, \$5,000, on boats, materials, and equipment	50.65
Millers Natl #556683, \$5,000, on boats, materials, and equipment	50.65
Alliance #1036, \$5,000 on boats, materials, and equipment	65.20
Agricultural #87486, \$5,000, on boats, materials, and equipment	65.20
	383.65
Fuel, to heating buildings for guards	
Telephone service for guards	474.10
Water service	118.70
Payroll for guards, including Old Age Assistance and Soc. Sec.	32.50
Light and power services	3,746.95
Inventory clerk for checking out materials and supplies to Dumphy Boat Corporation	346.46
Long distance calls to Bureau of Ships, Washington, D. C., and Dumphy Boat Corp., Oshkosh, Wis., in connection with requisition of property	75.38
Expenses for attorneys fees incurred in connection with hearing on requisition in the U. S. District Court at St. Paul, Minn., and later at Duluth, Minn., together with preparation of brief on legal question involved	10.62
Expenses of Trustee incurred on trip to Washington at the request of the Bureau of Ships for conference dealing with the disposition of said property, and trip to St. Paul for Court hearing on requisition	750.00
	189.03
Total	6,125.39
Fair value of property requisitioned	35,466.00
Amount of claim	41,591.39

(9) WHEREFORE; Petitioner requests that the amount of compensation and the person entitled thereto be determined according to law.

IV. Petitioner's Lucas Act claim also contained fifty-nine invoices which had been filed in support of his claim in the bankruptcy court. Six samples of these invoices (separated here by horizontal lines, with formal heading and certificate shown only for the first) are as follows:

(1)

INVOICE

INLAND WATERWAYS, INC.

BOAT MANUFACTURERS, MARINE MOTORS AND SUPPLIES
1000 MINNESOTA AVENUE

CUSTOMERS ORDER NO. -----

CONTRACT No. NOS.—91957.

DATE: October 29, 1942Sold to: Navy Department, Bureau of Supplies and Accounts,
Washington/ D. C.

TERMS

F. O. B.

Quantity	Description	Unit Price	Amount
Invoice for fuel oil and lubricating oil on board SC670 when delivered to Navy Yard—per Receiver's Report, Supply Department, Navy Yard, New York.			
2,184 gallons	fuel oil (Price paid at Detroit, Michigan)	10.4¢	\$227.14
564 gallons	fuel oil (Price paid at Duluth, Minnesota)	8.7¢	49.07
2,748 gallons	Total		276.21
80 gallons	lubricating oil	53.0¢	42.40
			318.61

"I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that State or local sales taxes are not included in the amounts billed."

INLAND WATERWAYS, INC.

By

S. J. BLACKMORE, President.

(2) Premium:

Overtime Sub Contractor Arrowhead Electric Company.

April 3rd 1942, to October 3rd 1942, on S. C. 671:

Radio expert 42½ hrs. @ 2.20 per hr.	\$93.50
Electrician 18 hrs. @ 1.87½ per hr.	33.75
Electrician 47½ hrs. @ 1.50 per hr.	71.25
Electrician 228½ hrs. @ 1.40 per hr.	319.90
Electrician 192 hrs. @ 1.25 per hr.	240.00
Helper 157 hrs. @ .75 per hr.	117.75
Helpers 66 hrs. @ .70 per hr.	46.20
Helpers 56 hrs. @ .60 per hr.	33.60
Total	\$955.95

(3) Extras as per itemized list in detail attached on Contract Nos. 91957 S. C. 670 and S. C. 671 **\$8,151.28**

(4) SC1059—Cost \$139,800.00—Progress payment Dec. 5, 1942—6% **\$8,388.00**
 SC1060—Cost \$139,800.00—Progress payment Dec. 5, 1942—11.5% **\$16,077.00**

Total	\$24,465.00
-------	--------------------

(5) Invoice on Attached Schedule to Cover Increased Cost Due to Changes Under Contract NObs-147 in Accordance with Article 3 **\$4,486.52**

(6) Damages on Contract NXss and NXsss.
 Contract price for 40 boats \$201,000.00.
 Estimated minimum profit 7.46%. Loss of profit as estimated **\$15,000.00**

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 6

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the
Inland Waterways, Inc., *Petitioner*,

v.

THE UNITED STATES OF AMERICA.

BRIEF FOR AMICUS CURIAE.

(Howard Industries, Inc.)

RAOUL BERGER

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IN THE
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EDWARD L. FOGARTY, as Trustee in Bankruptcy of the
Inland Waterways, Inc., *Petitioner*,

v.

UNITED STATES OF AMERICA.

—
BRIEF FOR AMICUS CURIAE.

(Howard Industries, Inc.)

The decisions below, jurisdiction to review, the provisions of the statute and executive order involved, and the statement of the case are set forth in Petitioner's Brief.

INTEREST OF AMICUS.

In *Howard Industries, Inc. v. United States*, 113 C. Cls. 231, 83 F. Supp. 337, the Court of Claims decided the issues here presented in favor of Amicus and against the Government.* Because of the conflict between that decision

* Accord: *Warner Const. Co. v. United States*, 80 F. Supp. 81 (D. D. C., 1948); same case, 113 C. Cls. 265, 83 F. Supp. 344 (1949); *Spicer v. United States*, 113 C. Cls. 267, 83 F. Supp. 345 (1949); *Modern Engineering Co. v. United States*, 113 C. Cls. 272, 83 F. Supp. 346 (1949); *Milwaukee Engineering & Shipbuilding Co. v. United States*, 113 C. Cls. 276, 83 F. Supp. 348 (1949); *Stephens-Brown, Inc. v. United States*, 81 F. Supp. 969 (W. D. Mo., 1949); *Pittston-Luzerne Corp. v. United States*, 84 F. Supp. 800 (M. D. Pa., 1949); *Prebuilt Co. v. United States*, 88 F. Supp. 588 (D. Mass., 1950). See also *McGann Mfg. Co. v. United States*, 83 F. Supp. 957 (M. D. Pa., 1949).

and that of the court below in the *Fogarty* case, certiorari was sought by petitioner and acquiesced in by the Government. Final disposition of the *Howard Industries* case has been postponed by the Court of Claims pending the outcome of the *Fogarty* case. Thus, decision by this Court against petitioner in the *Fogarty* case will foreclose recovery by Amicus in the Court of Claims. Our sole concern is with the construction of the Lucas Act.

SUMMARY OF ARGUMENT.

I

Relief for war contractors was limited by the First War Powers Act to cases where "such action would facilitate the prosecution of the war." The administrators granted relief only to those contractors whose continued operation was important to the war effort. After the surrender of Japan on August 14, 1945, some Government agencies refused relief because it could no longer facilitate the prosecution of the war.

The Lucas Act was enacted to remedy resulting hardships. In place of relief to "facilitate the prosecution of the war" the Lucas Act substituted the settlement of "equitable claims *** for losses *** incurred *** without fault or negligence."

This language was deliberately chosen to remedy the hardships disclosed at the hearings. The legislative history indicates a Congressional purpose to grant "fair relief, equitable relief" to contractors who had assisted in the war effort and had incurred losses through no fault or negligence of their own. And it shows that the language of the Lucas Act was carefully chosen to provide broader and "further relief" despite executive recommendations that relief be restricted to the narrow administrative categories engrafted upon the First War Powers Act.

II

The Lucas Act provides that

"a previous settlement * * * shall not operate to preclude further relief * * *"

The Executive Order which directs that

"no claim shall be considered if final action with respect thereto was taken"

on or before August 14, 1945, conflicts with the statute and is void.

The original bill provided that no relief was allowable where there had been a final disposition of the case. When the attention of the Committee was called to the resulting hardships, that provision was eliminated and replaced by the present § 3 which removes the bar of a "previous settlement." The Executive Order cannot now replace that provision with one that was so emphatically rejected.

The argument that the word "settlement" means only unilateral agency determinations, not bilateral agreements, is rebutted by the relevant statutory provisions and leads to unreasonable results.

III

Lucas Act relief is conditioned upon the filing of "a written request for relief" with the appropriate agency in a form sufficient to have given notice to the Government that it was for losses incurred. The Act does not require that it should have been cast in any particular form, nor that it should have contained any special phraseology.

IV

Congress recently passed a bill which repudiates the Government's construction of the Lucas Act; and in the accompanying reports it stated that the Government has "aborted" and "abrogated" the Act. The President's rejection of the Congressional construction, in vetoing the

bill, is flatly contradicted by the legislative history of the Lucas Act, and represents an extraordinary attempt to amend a statute. This can no more be accomplished by veto message than by Executive Order.

ARGUMENT.

I.

The Lucas Act Affords Broader Relief Than the First War Powers Act.

The court below held that relief under the Lucas Act (Act of August 7, 1946, 60 Stat. 902, 41 U. S. C. 106 Note) was limited to that earlier allowable under the First War Powers Act, (Act of December 18, 1941, 55 Stat. 839, 50 U. S. C. App. 601 et seq.), thus giving effect to paragraph 307 of Executive Order No. 9786.¹ The Court of Claims held, however, that

"*** Paragraph 307 of Executive Order 9786 is a regulation unauthorized by the Lucas Act and is in direct conflict with the express terms of the act and with its intent as revealed in its legislative history." 83 F. Supp. at 341.

This view, we submit, is fully supported by the language and legislative history of the Lucas Act. We shall show that when Congress enacted the Lucas Act it deliberately departed from the terms of the First War Powers Act, and employed entirely dissimilar terms in order to meet the mischief created by restrictive administrative constructions of the earlier Act.

¹ Paragraph 307 provides:

"Relief with respect to a particular loss claimed *shall not be granted* under the Act and these Regulations *unless* the war agency considering the claim finds *** that relief would have been granted under the First War Power's Act, 1941, if final action with respect thereto had been taken by the war agency on or before August 14, 1945." (Emphasis supplied throughout)

1) THE RULING OF THE COURT BELOW CONFLICTS WITH THE EXPRESS STATUTORY TERMS.

Comparison of the Lucas Act with the First War Powers Act, 1941, instantly discloses that the former provided new and different relief. Section 201 of the latter provided that a war agency might afford relief to a war contractor by contractual modifications whenever the agency

"deems such action would facilitate the prosecution of the war * * *."

That determination is not a prerequisite to relief under the Lucas Act. Instead, §1 of that Act authorizes the same war agencies to

"settle *equitable* claims of contractors, * * * for *losses**
* * * *incurred* between September 16, 1940 and August
14, 1945, *without fault or negligence* on their part
* * *."

Section 2(a) reiterates the "equitable" note, which played no role under the First War Powers Act:

"In arriving at a *fair and equitable* settlement of claims under this Act, the respective departments and agencies shall not allow any amount in excess of the amount of *net loss* * * * on all contracts and sub-contracts held by the claimant * * *."

² Prior to the Lucas Act "losses" had not moved the agencies to grant relief.

"The Navy Department has consistently maintained the position that contractors * * * should be held to the terms of the contract in the absence of fault on the part of the Government, and that any loss resulting from business risks assumed by the contractor must be borne by him. * * * there does not seem any obligation—legal, equitable, or moral—upon the Government to reimburse the contractor for his losses." Hearings on S. 1477, Subcommittee of Sen. Comm. on Judiciary (79th Cong., 2d Sess., 1946) (hereinafter Hearings), 4.

In place, therefore, of contractual modifications to "facilitate the prosecution of the war," the Lucas Act substituted the settlement (i.e. adjustment) of "equitable claims * * * for losses * * * incurred * * * without fault or negligence * * *." This Court has observed under similar circumstances that:

"The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended." *Brewster v. Gage*, 280 U. S. 327, 337 (1930).

Additional evidence that the Lucas Act provides broader relief than its predecessor is furnished by §3:

"a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief * * *."

The bar of a settlement under the Contract Settlement Act was removed by §3, in order to grant "further relief," not to remit a contractor to the narrow First War Powers Act relief which had been enlarged by the Contract Settlement Act.³ This is likewise true of the §3 removal of the bar of previous settlements under the First War Powers Act. Presumably the administrators had awarded all the relief that was available under their construction of that Act. To limit relief to that obtainable under that Act would prevent "further relief," thus rendering the Lucas Act nugatory. In short, if relief is confined to that obtainable under the First War Powers Act, that is to the Procrustean categories set up by the Armed Services as facilitating the pros-

³ "Further evidence that the Lucas Act provides broader relief than was contemplated by the First War Powers Act is found in the language of Section 2 directing that in determining the amount of a contractor's net losses, consideration shall be given to relief granted under the Contract Renegotiation Act, the Contract Settlement Act of 1944, the First War Powers Act, or any other relief granted." *Howard Industries, Inc. v. United States*, 83 F. Supp. at 340.

ecution of the war,⁴ the new authorization to settle (i.e., adjust) equitable claims for losses incurred without fault is deprived of its intended effect.

2) LEGISLATIVE HISTORY

So plain is the language of the Lucas Act that there is no need to resort to legislative history. We review that history only to show that Congress was determined to correct the evils resulting from restrictive administrative interpretations⁵ of the earlier act, and that it chose apt language to achieve that result.

⁴ The Navy representative described its "threefold" test of relief:

"First, the materials had to be needed by the Government. Secondly, that we could not get the materials we needed in that way except from this particular contract. If we could get it from some other source, it was too bad. And, third, the contractor had to have this relief and get the money or otherwise he could not keep in business." Hearings, 67.

The Army categories likewise precluded relief in the average "loss" case. The three hardship categories, according to the Army representative were

"* * *. [1] where we needed to maintain a contractor in business to prosecute the war * * *. [2] where a contractor suffered a loss through definite acts on the part of the Government * * *. [3] where a contractor relied on a specific promise of people that should have been able or had the authority to carry them out." Hearings, 56.

⁵ During the war, relief was withheld "notwithstanding the merits or equities involved" unless continued production by the particular contractor was "important to the war effort." Hearings, p. 18.

After V-J Day the War Department concluded that the grant of relief to contractors would no longer facilitate the prosecution of the war. Chairman McCarran commented

"Of course, that is an *extremely narrow view* to take of the language * * *." Hearings, 39.

And, commenting on the position that *payment* must facilitate prosecution of the war, he changed the emphasis radically:

"If, at the time the contractor sustained the loss, he was in the act of assisting in the prosecution of the war * * *, that is the

As originally drafted, the bill provided that relief could be granted

"whenever the head of such department or agency makes a determination that such action is necessary *to prevent a manifest injustice . . .*" Hearings, 1.

The subcommittee had been advised by the Attorney General at the outset of the *distinction* between the First War Powers Act which permitted modifications of contracts and the like whenever

"such action would facilitate the prosecution of the war,"

and modification of contracts under the proposed bill when

"such action was necessary to *prevent an injustice.*" Hearings, 2.

Mr. Weitzel of the General Accounting Office underscored this distinction when he stated that

"if paying more * * * to a contractor who had no further contracts with the Government were requested, the Department would feel that that was not an aid to the prosecution of the war. So, of course, *this provision that you now have is much broader*, in that the same action can now be taken if necessary to *prevent a manifest injustice.*" Hearings, 28.

Senator Revercomb interrupted to declare that

"I would not want to limit this in furtherance of the war, if the Government went into a contract under

*spirit in my judgment of the law. * * * The spirit giveth life, they say, but the letter killeth. That is pretty true in this case."* Hearings, 39.

Subsequently he said respecting a woolen mill, Hanover Mills, that

"by a technical interpretation they were denied the relief that to me, speaking as an individual, would have appeared justifiable." Hearings, 65.

And he repeated, on page 66, that the position of the War Department "was a *very technical construction.*" This position was characterized by Senator Lucas, the proponent of the bill, as "specious and fallacious." 92 Cong. Rec. 9092.

authority of law, and through no fault of the contractor he lost money, whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?" *Ibid.*

Mr. Weitzel replied that

"a better approach would be to authorize the presentation of *claims for losses* to a designated agency or tribunal for settlement upon an equitable basis, and Senator, that need not be limited to claims for losses incurred in furtherance of the war effort * * *. The primary thing, though, is that a specific tribunal such as the Court of Claims would be given the authority in the legislation to hear and pass upon *equitable claims of contractors for losses incurred* during the war period on contracts with the Government." Hearings, 29.

The subcommittee considered seven cases in which contractors were denied First War Powers Act relief. Only two of these turned on the interpretation that V-J Day deprived the Government of the authority to grant relief.⁶ And even in these cases a Government spokesman testified that relief could not be granted for reasons independent of V-J Day.⁷ In the other five cases the Government denied, for reasons apart from V-J Day, that it had power to grant relief.⁸ Colonel Holland testified that the War Department could not give relief in three of the cases. Chairman McCarran then asked

"studying this bill as it is now worded, will it accomplish the relief in these cases we have listened to? * * *"

⁶ The *Lake States Engineering Co.* case and the *Enjay Construction Co.* case, discussed at Hearings, pp. 16-17 and 19-21, respectively.

⁷ Hearings, 56.

⁸ *Hanover Mills*: Hearings 17-19; *McGann Mfg. Co.*: Hearings, 9-10; *Wulschleger*: Hearings, 10-11; *Shank Metal Products Co.*: Hearings, 11-12; *Merrimac Mills*: Hearings, 24-26.

Colonel Holland:

"Assuming the merits to be as stated * * *, assuming the Committee feels they should get relief, we feel that relief could be granted under the terms as written * * *." Hearings, 56.

Impressed with the hardship case histories,⁹ Chairman McCarran said:

"I think that those who meritoriously contributed to war effort should not be permitted to lose. * * * We will try to draft the bill, with the aid of the best counsel we can secure, and we may not pass the bill as it is now, and it may not pass at all, but if I had the doing of it alone, it would pass, but would pass in such a way that it would meet the point emphatically." *Id.* at 44.

Later, he added:

"It is always an element of justice that we try to apply to those who aided us in the way these companies did in the war.

"Take the road outfit * * *. It impresses me very much that due to certain conditions, if the facts were as stated, they would be entitled to equitable relief, fair relief.

"All the government wants to do is deal fairly with those who aided the Government in its great struggle." Hearings, 65-66.

This summation by Senator McCarran affords eloquent testimony of the intention to go beyond the niggling relief to which the Armed Services repeatedly sought to limit the

⁹ Early in the Hearings, Chairman McCarran said:

"The presentation so far made impresses me very, very much, that some legislation of this type is necessary. The legislation that we have before us in its present verbiage may not be that which is essential, but something is essential to bring about a measure of justice here." Hearings, 27.

proposed legislation¹⁰ and, which, having been defeated, they now seek to accomplish by administrative ukase.

In the statute, there was substituted for the original phrase

"to prevent a manifest injustice"

the present language of § 1, authorizing relief for

"equitable claims of contractors * * * for losses * * * incurred * * * without fault or negligence * * *."

This change was foreshadowed by suggestions made at the Hearings. Probably the phrase "without fault" had its origin in Senator Reverecomb's desire to grant relief not only for work done in furtherance of the war, but to include the case where:

"the Government went into a contract under authority of law, and *through no fault of the contractor* he lost money * * *," Hearings, 28.

The Senator recurred to this point when he asked a witness:

"Are you satisfied with the definite language in the bill, that such action is necessary to prevent a manifest injustice, or would you think it would be better to write in there * * * 'to pay and settle the losses actually incurred by the contractor, *without his fault*'?" Hearings, 35.¹¹

¹⁰ On March 18, 1946, for example, Secretary of War Patterson wrote Chairman McCarran of the Senate Judiciary Committee:

"It is considered that relief granted under S. 1477 should not be broader than that granted under the First War Powers Act." Hearings, p. 6. See also letter of Acting Secretary of the Navy Kenney, May 2, 1946, Hearings, 3-5.

¹¹ Senator Reverecomb had earlier said with respect to the original phrase "prevent a manifest injustice":

"Is this not a claim based upon *actual loss without the fault of the contractor*?"

To which Mr. Weitzel, representing the General Accounting Office, replied:

"That is the way it looks to us * * *." Hearings, 27.

Thus the settlement of "losses * * * incurred * * * without fault"—the present statutory phrase—was intended to be even broader than the phrase "prevent a manifest injustice," which the Attorney General had at the outset distinguished from the First War Powers phrase "facilitating the prosecution of the war." *Supra*, p. 8.

The qualification that there be "equitable claims" for losses, and a "fair and equitable settlement of claims" may be traced to the amendment offered by Senator Capenhart, who wrote Senator Lucas that:

"The Navy Department has approved the bill—with the exception that it suggests that the words 'to prevent manifest injustice' * * * should be more definitely explained. Yet, these words in your bill are almost identical in their meaning with the words '*upon a fair and equitable basis*'—which are the words found in the Dent Act relating to the Navy Department in section 1 thereof." Hearings, 81.

The representative of the General Accounting Office similarly suggested that provision should be made for

"settlement upon an *equitable basis*,"

and that a tribunal be established to

"pass upon *equitable claims* of contractors for losses incurred * * *." Hearings, 29.

Thus the Chairman's insistence upon "equitable relief, fair relief," upon dealing "fairly with those who aided the Government," Hearings 65, found unmistakable expression in the statute.

In the teeth of this history and of the language deliberately chosen to cure the mischief there disclosed, the Government's contention that the Lucas Act is no more than a temporal extension of the First War Powers Act

is merely a renewal in the courts of the battle it fought and lost in the Congress.¹²

Ultimately, the government's position rests on paragraph 307 of Executive Order No. 9786, *supra*, note 1, and a portion of the Committee Report accompanying the Act. It can find support in neither.

Executive Orders like administrative regulations may not be inconsistent with or in contradiction to the statutes they seek to implement. The only authority conferred by a statute, this Court has admonished, is to issue orders and "to make regulations to carry out the purposes of the Act—not to amend it." *Miller v. United States*, 294 U. S. 435, 440 (1935), and cases cited. See also *Social Security Board v. Nierotko*, 327 U. S. 358, 370 (1946); *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489 (1942). And this is no less true of the Executive Orders promulgated by the President, than it is of the regulations promulgated by lesser executive officials. See *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420-433 (1935).

The paragraph extracted from the Committee Report¹³

¹² In thus contending that the Lucas Act left them just where they were, the defense agencies richly fulfill the fears of Congress. Toward the conclusion of the Hearings, Chairman McCarran remarked

"*** we are now trying to enact a bill *** and will the War Department have to interpret that bill also, or shall we make it so plain that it will lay the road wide open for the War Department to render justice in a given case? That is the thing that I have in mind ***." Hearings, 50.

And he continued:

"What I want to know is if everybody is satisfied that this bill in its present form will do the job *** I do not like to work for weeks and then put a bill through that *** does not cover the case, or the War Department can say, 'Well, we are no better off than we were, because here is certain language that limits our action.' We recognize the merits of this case, but the language of this bill forestalls us." Hearings, 50.

¹³ "This bill, as amended, would afford financial relief to those contractors who suffered losses in the performance of war contracts in those cases where the claim would have received favorable

is equally unavailing. This Court has indicated that where a Committee reports "the chief purpose" of a bill, a statute will not be narrowed when its terms and its history indicate a broader intention. *Canadian Aviator Ltd. v. United States*, 324 U. S. 215, 225 (1945); see also *Fides, A. G. v. Commissioner of Internal Revenue*, 137 F. (2d) 731, 734 (C. A. 4th, 1943). And this Court has refused to permit one illustrative example to outweigh general considerations regarding the meaning of a statute. *United States v. Ogilvie Hardware Co.*, 330 U. S. 709, 719 (1947).

At best, the language of the Report constitutes a hasty and imperfect shorthand description that cannot be permitted to thwart the intention of Congress as exhibited in unequivocal terms in the Hearings, and given expression in language framed to cure the evils there disclosed.

II.

A Prior Settlement is Not a Bar.

1) THE STATUTORY TERMS.

The court below did not reach the question whether a prior settlement barred Lucas Act relief, but the district court ruled in favor of the Government on this issue. The Court of Claims, however, announced a contrary rule, and flatly held that paragraph 204 of the Executive Order

"is in direct conflict with the wording of the Lucas Act as enacted and with the intent revealed in its legislative history." 83 F. Supp. at 342

We need only compare the Lucas Act provisions with paragraph 204 to demonstrate that the Order attempts to nullify the statute.

consideration under the First War Powers Act and Executive Order No. 9001 if action had been taken by the Government prior to the capitulation of the Japanese Government." Senate Report, No. 1669 (79th Cong. 2d Sess., 1946), p. 3.

There are remarks of a similar tenor by Senators Lucas and McCarran at 92 Cong. Rec. 9692 and Hearings 17

Section 3 of the Lucas Act provides in pertinent part:

"a previous settlement under the First War Powers Act, 1941, or the Contract Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable under this Act."

Paragraph 204 of Executive Order No. 9786 provides that:

"no claim shall be considered if final action¹⁴ with respect thereto was taken on or before that date [August 14, 1945]."

Manifestly, when the statute declares that "a previous settlement [importing final action] * * * shall not operate to preclude further relief," a provision to the contrary in an Executive Order, namely, that "no claim shall be considered if final action with respect thereto was taken," is repugnant to the statute and void.

2) THE LEGISLATIVE HISTORY.

In its inception, S. 1477 declared in the second proviso that:

"this section shall not be applicable to cases submitted under section 201 of the First War Powers Act, 1941, which have been finally disposed of under such section upon their merits prior to August 14, 1945." Hearings, 1.

The War Department wrote Senator McCarran that:

*"it would be undesirable to reopen at this time the large number of contracts which have been completed and final payment made thereon. * * * Furthermore, if a contract has been terminated and final settlement reached, the finality provided in such cases by the Contract Settlement Act of 1944 should be preserved."* Hearings, 6.

¹⁴ The Contract Settlement Act of 1944, 41 U.S.C. 106, makes agreements of settlement "final and conclusive." See *infra*, page 19.

The restrictive effect of this position was emphasized by Mr. Weitzel, representing the General Accounting Office:

"the provisions of the bill are not to be applicable to cases finally disposed of on their merits under section 201 of the First War Powers Act prior to August 14, 1945. This provision would seem to exclude many cases which presumably, if they had any merit, were determined prior to that date, and might leave rather a small area upon which the bill could operate." Hearings, 28.

He continued:

"I think, too, if you give effect to the provisions of this bill, *you will exclude* many cases which might be thought meritorious by the contractors, but which were decided *adversely to the contractors* for this very reason, that the department thought that action would not be in furtherance of the war effort."

**** That may not be the intended approach under this bill, but the language of the bill has that limitation, that if the case was settled under the First War Powers Act, it could not be reopened now.*"¹⁵ Hearings, 29.

In response to this and other criticism, the original "finality" provision was not merely elided—the Congress took the additional precaution *expressly* to remove the bar of prior settlements. Here, as in *Border Pipe Line Co. v. Federal Power Commission*, 171 F. (2d) 149, 152 (App. D. C., 1948), the Court is asked

"to read the statutory definition as though it contained the phrase originally included but later eliminated by Congress in the legislative course of the Act. This

¹⁵ Mr. Weitzel's remarks carried great weight, as may be seen from Senator McCarran's remark:

"I want to say to you that some of his comments struck me forcibly. In other words, that the *very thing* that we are seeking to do by this bill *might not be done* by reason of certain language of the bill." Hearings, 35.

Senator McCarran mistakenly identified Weitzel as the representative of the Comptroller General's Office, which had no representative at the hearing.

"we cannot do. We cannot write into an act of Congress a provision which Congress affirmatively omitted."

This was likewise the view of the Court of Claims. 83 F. Sup. at 342.

It remains to examine the remark made by Chairman McCarran:

"I do not understand that the idea of the bill is to direct payment of something that was turned down on its merits." Hearings, 64.

But he went on to say,

"I do not think the Congress of the United States will want to inject itself into a judgment on the merits, *on the facts.*" Hearings, 65.

But many claims which had been dismissed "on the merits" justified relief on equitable grounds. Moreover, partial relief granted to keep a contractor alive for the war effort was a final decision "on the merits," and a bar precluding the reopening of such decisions would be inconsistent with the "equitable" purpose of the bill, i.e. "to prevent manifest injustice." This became clear after a colloquy between Mr. Weitzel and Colonel Holland of the Contracts Relief Advisory Committee of the War Department. Mr. Weitzel:

"Suppose a claimant claims \$500,000 and you feel \$300,000 would keep him in business, and awarded him that; would that be final?"

Colonel Holland:

"Yes * * *."

Mr. Weitzel:

"That being the case, would that preclude determination of some cases decided on the merits?"

Colonel Holland:

"I think it would be precluding to all."

* * *

Mr. Weitzel:

"I am just trying to see if something cannot be done to put safeguards in the bill without affecting any relief which the committee feels should be granted against bona fide loss in performing these contracts." Hearings, 62.

Such "partial" settlements obviously did not make good the contractors' losses.

Moreover, if contractors whose claims had been rejected prior to V-J Day because they were not essential to the war effort were now to be paid in full for losses, an unfair discrimination would result against the indispensable contractors who had received by way of settlement only enough to keep them afloat. Such a discrimination was patently at war with any attempt "to prevent a manifest injustice."¹⁶

Against this background, the elision of the original proviso barring cases involving earlier final dispositions on the merits and the substitution of the present proviso that a "previous settlement" shall not preclude "further relief," is decisive against the Government.

The Government has countered by arguing that the word "settlement" is a word of art, meaning a "unilateral" determination by the Government, and not including bilateral agreements by contractors with the Government. The argument is untenable. In implementation of the First

¹⁶ Various contractors urged that previous settlements be reopened. Hearings 26, 49. In a similar situation, this Court said

"The counsel who had represented Crane-Johnson * * * appeared * * * before the Senate Committee and made a plea for relief * * *. He urged that such corporations had been 'caught in a trap,' and that they were justly entitled to have a refund for that reason. It was apparently in response to the foregoing complaints that the relief provision before us, not part of the House bill as it came to the Senate, was introduced by the Senate Committee. We think Congress was moved to relieve those corporations which it considered to be 'caught in a trap' * * *. *United States v. Ogilvie Hardware Co.*, 330 U. S. 709, 716-717 (1947)."

War Powers Act, Executive Order No. 9001 provided in Title I, par. 3; that

"The War Department, the Navy Department * * * may by agreement modify or amend or settle claims under contracts heretofore or hereafter made * * * and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort * * *."

Manifestly settlements created by bilateral agreements were thus specifically authorized. The Contract Settlement Act of 1944, to which §3 of the Lucas Act refers, shows even more clearly that the word "settlement" was designed to comprehend both unilateral and bilateral agreements. Section 106(e) of that Act provides:

"Any contracting agency may settle all or any part of any termination claim under any war contract by agreement with the war contractor, or by determination of the amount due on the claim or part thereof without such agreement * * *. Where any such settlement is made by agreement, the settlement shall be final and conclusive * * *." 41 U. S. C. § 106(e).

Furthermore, the Government's position would render the "settlement" provision pointless. The Contract Settlement Act of 1944 provides that no appeal may be taken from bilateral agreements, but that there may be appeals from unilateral determinations. Under the Government's construction of "settlement" in the Lucas Act, there would be a superfluous new right of appeal from a unilateral determination, whereas the earlier non-appealable bilateral agreement would be untouched, thus leaving the contractor exactly where he was before the Lucas Act was passed. But the Congress sought to rescue the contractor from that hapless plight. See *Howard Industries, Inc. v. United States*, 83 F. Supp. 337, 341. As was said in that case,

"The word 'settlement' * * * was used in two senses in both the First War Powers Act and in the Contract

Settlement Act, that is, settlement by unilateral agency determination, and settlement by bilateral agreement. The Lucas Act merely says that settlements (without qualification) under either or both acts shall not operate as a bar. From the plain language of the act, we can only conclude that the word 'settlement' was intended to include both kinds of settlement provided for in the two Acts mentioned in section 3." *Id.* at 342.

We submit that Section 3 of the Lucas Act means exactly what it says:

"a previous settlement under the First War Powers Act, 1941,¹⁷ or the Contract-Settlement Act of 1944 shall not operate to preclude further relief otherwise allowable¹⁸ under this Act."

III.

Written Request for Relief.

Section 3 of the Lucas Act provides that claims shall be limited to

"losses with respect to which a written request for relief was filed"

¹⁷ Perhaps the settlement in the *Fogarty* case is atypical, for it involved approval by the bankruptcy court. The Court below held that the settlement

"was not a settlement of claims for relief under the First War Powers Act, but was a final adjudication by the bankruptcy court of appellant's claims against the Navy Department" 176 F. (2d) at 601.

Amicus takes no position as to whether such a settlement is or is not within the purview of §3 of the Lucas Act.

¹⁸ In the Court of Claims the Government took refuge in the words "otherwise allowable under this Act," urging that §6 of the Lucas Act limited judicial determination to an amount not exceeding the amount which might have been allowed by the agency under the terms of the Act. Reliance was placed on the limitations placed on relief by paragraphs 204 and 307 of the Executive Order, which made administrative disallowance mandatory. Therefore, the Government urged the relief was not "otherwise allowable under this Act." The Court held that since both regulations were invalid, the relief was in fact "otherwise allowable." 83 F. Supp. at 342-343.

In the words of the Government, the court below held that such a request

"must have been a request for the kind of modification without consideration made available by Section 201 of the First War Powers Act * * *." Memorandum for the United States, p. 2.

This ruling merely restates the untenable argument that the Lucas Act did no more than extend the period within which First War Powers relief could be granted.

In various courts, however, the Government has contended that the provision means that a contractor must have filed a new request for further relief after his termination claims have been disposed of; it has argued that the provision requires that the writing requesting relief contain the word "losses;" and it has claimed that the written request for relief must be in a special form.

Congress did not insist upon the clairvoyant filing of requests for additional relief before enabling legislation made further relief possible. Prior to the Lucas Act, the Government had disabled itself from granting relief which did not fall into narrow categories. Moreover, settlements made under the Contract Settlement Act were "final and conclusive." Hence any requests for further relief, would have been utterly futile.¹⁹

'Nor is there any magic in the word "losses."²⁰ No em-

¹⁹ "We cannot believe that when Congress enacted the Lucas Act in 1946 it intended that relief under that Act should be conditioned on a plaintiff's having filed a request for relief that the Government had, by statute, disabled itself from granting." *Howard Industries, Inc. v. United States*, 83 F. Supp. at 343.

²⁰ In the *Fogarty* case, the district court stated:

"The invoices contained nothing to identify them as requests for relief from losses and as applications for First War Powers Act relief rather than for extras under the contract. Obviously a contractor may present claims for extras without representing either that he sustained a loss or that he seeks relief from a loss. The word 'losses' was conspicuously missing. The documents now relied on by petitioner were invoices for money claimed under the contracts. They are not written requests for relief from losses within the meaning of the act." 80 F. Supp. at 92-93.

phasis is placed upon this word in the statute. The existence of losses is, of course, important because the fact is the basis of "further relief." But to require that the word "losses" appear in a request for relief would place a premium upon prophecy. Prior to the passage of the Lucas Act, contractors could not have guessed that the word "losses" would be the "Open Sesame" to future relief. To insist on such prescience is to thwart Congress' intention to grant "further relief."²¹

By the same token, there is no requirement that requests for relief must have been cast in some particular form. The Act merely provides that claims be limited

"to losses with respect to which a *written request for relief* was filed."

In employing simple and homely terms, Congress shied clear of any dogmatic insistence on form. A writing which shows in one form or another²² that relief was requested satisfies the Act. All that is required by the statute is a writing filed prior to August 14, 1945, which shows on its face that losses have been incurred, and that the contractor seeks to be made whole, whether by a claim for extra compensation, by "adjustment," or the like. Only in this way can the statute be given effect. This was the holding

²¹ "Surely a claimant under the Lucas Act is not to be barred because, when it sought relief months before August 14, 1945, it was not enough of a prophet to phrase its claims specifically in the words of a statute which was still months in the future. It is enough if, before that critical date, it put the government on notice that it sought not merely such adjustments as it might be entitled to have made as a matter of right under its contract, but also that it asked relief over and above its strict contract rights." *Prebilt Co. v. United States*, 88 F. Supp. 588, 591 (D. C. Mass., 1950).

²² *** now I am talking primarily about where contractors are applying for relief in one form or another." Senator Lucas at Hearings, 20.

of the Court of Claims.²³ The contrary position of the Government renders the statute a still-born abortion. This, as we shall now show, has been placed beyond doubt by the subsequent action of Congress.

IV.

Congress Has Expressly Repudiated the Government's Position.

In passing a "clarifying" amendment, both the Senate and the House stingly repudiated the construction given to the Lucas Act by the Government. The House bill, H.R. 3436 (81st Cong. 1st Sess.) was addressed to the "request for relief" provision, and the report of the Committee on the Judiciary (H. Rept. No. 422, April 11, 1949) stated with respect to the administrative construction

"We believe this construction to be an *erroneous interpretation of the intention of Congress* in passing the Lucas Act. We believe that while relief under the First War Powers Act to World War II contractors was predicated solely on the interest of the Government in prosecuting the war, the Lucas Act was more remedial in its nature. *The Lucas Act was broader in its application* and under it the contractor was required to show, not that the granting of relief would facilitate prosecution of the war; but that, without fault or negligence on his part, he had suffered a net loss on his Government contracts during the statutory period, and that during that period he had requested relief in writing from the agency or department involved.

"The committee is informed that the *technicality* most frequently indulged in by the Government in its rejection of claims under the Lucas Act has been that

²³ It held that the "request for relief" provision "merely means *** that claimants must be able to show that they had made timely *** protest to the contracting agencies concerning the losses now sued on and so have given those agencies an opportunity to either grant or deny their claims." 83 F. Supp. at 343.

the request for relief lacked the *formalities which the agencies read into the simple language* of the act, but as to which the act was silent. Thus, it is contended that the request for relief referred to in the statute required a specific request that the contract be amended without consideration under the extraordinary contracting authority conferred by the First War Powers Act. *The act cannot and should not be so read.*"

"It is the *purpose of the bill to relax the agency-imposed formal requirements of these requests for relief* and to make equivalents out of such tangibles as demands for payment of losses or statements of such losses which were sufficient to inform the Government or the prime contractor (in the case of subcontractors) that a loss was being suffered, was anticipated, or had been suffered by the contractor or subcontractor in connection with the work in question." (pp. 1-2)

The Senate report (S. Rept. No. 1632, 81st Cong. 2d Sess., May 17, 1950) was even more severe in its criticism. It stated that:

"The present proposed amendments to the Lucas Act stem largely from *erroneous and restrictive interpretation* of that act." (p. 3)

"The committee are of the opinion that H.R. 3436 should be enacted, since it is abundantly clear that *the administrative interpretation of the Lucas Act is in effect an abrogation of that act.* * * * It is the opinion of the committee, as demonstrated in the report, that the purpose of the Lucas Act was to afford a broader basis of relief than had been given in the First War Powers Act of 1941, and that, beyond question, *this purpose was aborted by the strict administrative interpretations.* The intent of the present bill is to restore the relief provisions of the Lucas Act, and the committee, in approving H.R. 3436, wish it made clear that this bill, as amended, affords what the committee consider a just and equitable basis for relief, not confined to relief which might have been afforded under the First War Powers Act." (p. 6)

And the Senate Committee added that:

*"the committee agree that the administrative interpretations of the Lucas Act in effect abrogated that act ***" Ibid.*

The bill as approved in the Senate was passed by both the Senate and the House, but it was vetoed by the President. In his veto message the President stated

"I cannot accept the contention that the purpose of the War Contractors Relief Act, which H.R. 3436 would amend, was other than to provide a basis for relief to those contractors whose cases would have been handled under the First War Powers Act if war had not ended. Had I believed there was a broader purpose, I would not have issued the kind of regulations which were promulgated in Executive Order 9786." H.R. Doc. No. 629, 81st Cong. 2d Sess., June 30, 1950, p. 2.

The Presidential point of view is not altogether surprising when it is recalled that the Attorney General, who has maintained that point of view in the courts, drafts or assists in drafting both executive orders and veto messages.

The Congress, however, has not let the matter rest. In S. Rept. No. 2052 (81st Cong. 2d Sess., July 17, 1950), accompanying S. 3906, a new bill, the Senate reaffirmed its position, stating (p. 2) that no relief has been secured by smaller contractors because of

*"technical and restrictive interpretations of the phrase 'request for relief' in section 3 of the act. * * * It was intended by Congress, of course, that it should include (but not be limited to) relief through a change of contract terms as authorized by the First War Powers Act. That act permitted, and thereunder contracting agencies of the Government accorded, various types and forms of relief. Contractors could seek relief in many other ways * * * as [by] a simple petition."*

The House (H. Rept. No. 2704, 81st Cong. 2d Sess., July 20, 1950, to accompany H. R. 9121) was at pains to state that the new bill

"is designed not only to comply with the specifically enumerated proposals contained in the veto message for legislation acceptable to the President, but also to reassert the original purposes of the Lucas Act."

"Consideration of the construction and interpretation of the Lucas Act by the administering agencies clearly reveals the necessity for clarifying legislation. The frustration of the original intent of the Lucas Act is adequately described in the House Committee report which accompanied H. R. 3436 (H. Rept. 422, 81st Cong.), to which we advert with approval." (p. 1)

The report continues that

"it was the intention of Congress by the Lucas Act, as reaffirmed by this measure, not to preclude consideration of losses not reimbursed under the First War Powers Act, 1941, or the Contract Settlement Act of 1944, if otherwise allowable under the Lucas Act."

* * * * *

"The most frequent basis for controversy in cases decided by the administering agencies pursuant to the Lucas Act has been as to whether claimants had complied with the legal niceties of interpretation by the agencies of the simple term 'request for relief.' This issue was thoroughly discussed in the report of this committee hereinbefore referred to. We understand that the administration is in thorough agreement with our previously expressed view that failure to conform to the technical requirements imposed by the agencies should not bar recovery in meritorious cases. The present bill follows literally the President's recommendations on this subject by requiring that the request, notice, or demand be in writing and filed prior to August 14, 1945. In order to avoid any further doubt arising from the language of the reported bill, we wish to make it abundantly clear that the precise form of the request for relief is immaterial so long as it is in writing and is either (a) a specific request for relief available under the First War Powers Act, 1941, or (b) a demand for payment of losses, or (c) a notice of such sustained or impending loss. The President listed these three varieties in the alternative, and none

'of them is to be construed as to limit or modify any one or both of these others.' " (pp. 1-3)

The history of the Lucas Act earlier outlined abundantly supports the views of the Committees on the Judiciary in both Houses respecting the original intention to grant broader relief than was provided by the First War Powers Act. And we need not dwell on the weight that is attached to an unequivocal interpretation by the Congress of its own prior legislation. If great weight is to be attached under the "reenactment rules" to the silence of Congress in the face of administrative constructions,²⁴ the categorical, express repudiation by the Congress of administrative constructions must be given no less. Under all the circumstances, we submit that the conflicting Presidential veto is entitled to little weight. The President made no comment respecting the content of the Lucas Act when he signed the bill. The Executive Order, drafted by the Attorney General, attempted to read into the statute requirements that the Congress had emphatically rejected. The President cannot read into an act requirements so rejected, whether by Executive Order or veto. To permit him to do so would constitute him a super-legislature, and to amend legislation by Executive Order or subsequent veto.

CONCLUSION.

The Lucas Act represents a thorough-going attempt to strike the interpretive shackles with which the administrators had fettered themselves. On this score, we have the last word uttered to the Senate by Senator Revercomb:

"With respect to the Navy's construction, under the present War Powers Act of the right to make settle-

²⁴ Compare the weight attached to

"the fact that Congress has twice refused to write the Custodian's present construction into the law." *Uebersee Finanz-Korp. v. Markham*, 158 F. (2d) 313, 316 (App. D. C., 1946).

Here there is a well-documented rejection of the administrative construction and a purposeful "clarification" thereof.

ment, let me say *I hope this bill supersedes in every respect every right derived from the War Powers Act for such settlements.*" 92 Cong. Rec. 9092.

We submit that the plain language of the Lucas Act and the clearly expressed intention of Congress as disclosed in the legislative history require that Paragraphs 307 and 204 of Executive Order 9786 be declared invalid, and that the decision of the court below respecting the scope and requirements of the Lucas Act be reversed.

Respectfully submitted,

RAOUL BERGER

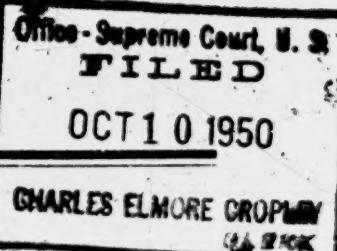
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Chicago, Illinois

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IN THE

Supreme Court of the United States

October Term, 1950

No. 6

EDWARD L. FOGARTY, as Trustee in Bankruptcy of the
Inland Waterways, Inc., *Petitioner*,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR AMICUS CURIAE.

(Howard Industries, Inc.)

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REPLY BRIEF FOR AMICUS CURIAE.
(Howard Industries, Inc.)

This is a simple case. It involves three almost self-evident propositions which are disclosed by the face of the statute and strongly reinforced by the legislative history.

- 1) The substitution for an existing statute of a new statute employing entirely different terminology shows that what was intended was not a mere temporal extension of the earlier statute but a change of law.

2) The statutory mandate that a

"previous settlement * * * shall not operate to preclude further relief"

is plainly nullified by an Executive Order that

"no claim shall be considered if final action with respect thereto was taken"

prior to a certain date.

3) There is no evidence that Congress was advised of a peculiar meaning attached by the administrators to the filing of a "request for relief." Were there such evidence, the phrase could still not be construed to require compliance with conditions impossible of fulfillment, for to do so would defeat the plain intention of Congress to grant relief.

The fact that the Government requires 80 pages of tortured analysis to explain why facts so plain are delusive should without more arouse suspicion. It would take another 80 pages to comment on every thread of the Government's web of speculation. We therefore content ourselves with comments on the highlights.

I.

THE LUCAS ACT AFFORDS BROADER RELIEF THAN THE FIRST WAR POWERS ACT.

Ignoring the "deliberate selection of language so differing from that used in the earlier acts" which, this Court has stated, "indicates that a change of laws was intended," *Brewster v. Gage*, 280 U. S. 327, 337 (1930), the Government urges that the Lucas Act is a mere temporal extension of the First War Powers Act. Brief for the United States, 25-33 (hereafter U. S. Brief). Had this been Congress' sole purpose, however, it would have been a simple matter to add a phrase merely extending the relief available under the First War Powers Act for another 6 or 12 months. Instead, Congress discarded the "facilitate the

prosecution of the war" formula of the First War Powers Act under which, as the Navy Department emphasized,

"any loss resulting from business risks assumed by the contractor must be borne by him." Hearings, 4.¹

And it wrote an elaborate new statute which in § 1 provided for settlement of

"equitable claims of contractors * * * for losses * * * incurred * * * without fault or negligence on their part."

It did this because, as one member of the Committee early remarked:

"I would not want to limit this in furtherance of the war, if the Government went into a contract under authority of law, and through no fault of the contractor he lost money, whether in furtherance of the war effort or peace effort, does not the same principle apply, of right?" Hearings, 28.²

¹ Hearings on S. 1477, Subcommittee of Sen. Comm. on Judiciary (79th. Cong. 2d Sess., 1946). The Attorney General indicated that First War Powers Act relief required

"findings that the prosecution of the war will thereby be facilitated, thus contemplating a clear benefit to the United States." 40 Op. Atty. Gen. at 233. (Emphasis supplied throughout)

Contractors, says the Government, were merely "the incidental beneficiaries." U. S. Brief, 24-25.

² The Government asserts:

"There was no indication that Congress was dissatisfied with the administration of relief under the First War Powers Act prior to V-J Day." U. S. Brief, 56.

We invite the attention of the Court to the colloquy between General Counsel Neale of the Navy Department and Chairman McCarran, set out at Hearings, 65.

Mr. Neale: "We have had a number of cases where contractors have through bad judgment on their own part or through unfortunate circumstances unforeseeable at the time lost money but yet we could not give them relief because in our opinion they did not conform to the standards [see the relief categories, note 4, Main Brief], which we have applied

And the Chairman of the Committee, Senator McCarran, said:

"I think that those who meritoriously contributed to the war should not be permitted to lose." Hearings, 44.

New terminology was adopted to escape from the stultifying administrative interpretation of the old and to afford the new and broader relief desired by the Congress. No satisfactory explanation for this radical shift in statutory language has been offered by the Government. And it has studiously omitted to discuss the mass of history adverse to its case (see our Main Brief, 7-14), confining itself to carefully culled excerpts which cannot withstand close analysis. Although it is arguable that in light of the plain terms of the Lucas Act there is no room for appeal to the legislative history, *Ex parte Collett*, 337 U. S. 55, 61 (1949), and cases cited, we have recounted it in our Main Brief (pp. 7-14) and shall further comment on it because it graphically reveals that the administrators, as the Congress has since unequivocally and repeatedly declared (*infra*, pp. 22-24; Main Brief, pp. 23-27), are bent upon thwarting the Congressional intent.

Without doubt, as the Government needlessly expatiates, the Lucas Act was first designed to correct the illiberal administrative interpretation which cut short relief upon

during the war. * * * If it were something which was not at all the responsibility of the Government but just an unfortunate circumstance which arose during the performance of the contract, he was afforded the relief of a private bill. * * *

Chmn. McCarran: "A private bill takes care of one case only."

Mr. Neale: "That is correct."

Chmn. McCarran: "There may be thousands of cases where no private bill is introduced or ever will be introduced. That will put these companies into bankruptcy or out of business. It is always an element of justice that we try to apply to those who aided us the way these companies did during the war."

See also Main Brief, note 5.

the cessation of hostilities. U. S. Brief, 25-33. But the Congress broadened its purpose when it learned in the course of the Hearings of a small group of hapless contractors who had been crushed in the jaws of war. The Government itself has pointed out that

“the pressure of war and the uncertainties attending new types of production frequently made accurate estimates of costs and production time impossible; *** some contractors would probably underestimate their costs and assume ruinous obligations ***.” U. S. Brief, 20.³

Such contractors had little choice for, as Senator McCarran said,

“in time of war, contractors are not free to exercise their own determination with respect to whether they will take war contracts; if they refuse, their plants may be taken over; furthermore, they cannot get materials for normal production.” 96 Cong. Rec. (Unbound) 14870-71.

It was the recital of such hardship cases that moved Senator McCarran to declare that such contractors

“would be entitled to equitable relief, fair relief.”

“All the Government wants to do is deal fairly with those who aided the Government in its great struggle.” Hearings, 66.

The “history” on which the Government rests its case will not support the burden. It repeatedly invokes some words of Senator McCarran and of “the Judiciary Committees of both Houses,” U. S. Brief, 30-31. But the Senator and both Committees have excoriatingly repudiated

³ “The demands for war equipment and supplies were so great in volume, were for such new types of products, were subject to so many changes in specifications and were subject to such pressing demands for delivery that accurate advance estimates of cost were out of the question.” *Lichter v. United States*, 334 U. S. 742, 767 (1948).

the construction put upon the Lucas Act by the Government. *Infra*, pp. 22-24; see our Main Brief, 23-27.

It is true that Senator Lucas, in *introducing* the bill referred to the administrative view that relief was cut off by the cessation of hostilities. U. S. Brief, 28. And certain remarks made by him at the outset of the Hearings are of the same tenor. *Id.* at 28-29. But these remarks, addressed to the original draft of the bill, are without significance, for the bill was completely redrafted in Committee because of the testimony which followed the remarks.⁴ The three cases which he discussed with the Committee did at first appear to be cases "caught" by VJ-Day, U. S. Brief, note 14, for which, in other words, no relief could be had under the First War Powers Act. But when Colonel Holland later testified that no relief could be had in these cases—Enjay, Lake State, Hanover Mills—for reasons apart from the cessation of hostilities (see Main Brief, note 4), and was asked whether the new bill would "accomplish relief in these cases," he replied that

"relief could be granted under the terms as written
* * *." Hearings, 56.

Senator McCarran's remarks on the floor (U. S. Brief, 29-30) are at best illustrative, and do not derogate from the sweeping relief he espoused in the Hearings (Main Brief, 9-10; note 5), and which he has since categorically stated it was the purpose of the Lucas Act to grant, *infra*, p. 22. The Committee reports were likewise illustrative, and as this Court has held, they cannot narrow the statute when its terms and its history indicate a broader intention. Main Brief, 14. That history is detailed in the Hear-

⁴ "Extensive hearings were held by the Committee. * * * After the hearings were concluded, we submitted the matter for reconsideration from the standpoint of redrafting the language of the bill. The language was carefully redrafted so as to limit it in every respect and to protect it in every respect." Senator McCarran at 92 Cong. Rec. 9092.

It needed "protection" against renewed administrative attenuation. See Main Brief, note 12.

ings. We urge the Court to read the Hearings, which are no more extensive than the Government's brief, because they leave no room for the tissue of speculation woven by the Government.

Against the striking change of statutory language, which differentiates the Lucas Act from its predecessors, the Government opposes an argument composed of strained inferences. First, it argues that

“Only agencies empowered to grant War Powers Act relief may grant Lucas Act relief * * *. ” U. S. Brief, 11.

What was more natural? Amendment of a statute ordinarily affords no occasion for displacing its administrators, and their retention as administrators is therefore meaningless. Second, it argues that

“only contractors who filed ‘requests for relief’—the special designation for War Powers Act applications⁵—before VJ-Day can claim under the new Act; similarly, the statute characterizes awards under the new Act as ‘relief’ * * *. ” *Ibid.*

There is no indication that the VJ-Day limitation had any purpose beyond naming a convenient cut-off date. And Congress would have been hard put to find a fitting substitute for the words “relief” once it determined to grant relief from losses, as the Hearings and statute show it did. It had no occasion to search for a substitute term to accomplish its broader purpose since the word “relief” is not even mentioned in either the First War Powers Act or Executive Order 9001 issued thereunder. Third, the Government seeks to wrest a favorable inference from the fact that under the Lucas Act

“consideration must be given to all prior First War Powers Act and like relief.” *Ibid.*

⁵ We shall hereinafter dispose of this attempt to convert the “request for relief” into a term of art. *Infra*, pp. 10-11.

To be sure, § 2 provides that the administrators

"shall not allow any amount in excess of the amount of the net loss"

and, as a precaution, provides that they

"shall consider * * * (2) relief granted under section 201 of the First War Powers Act, 1941, or otherwise * * *."

This was merely to make certain that the administrators would not duplicate earlier relief or award relief in excess of net losses. Indeed, § 2 indicates, as is made more plain by § 3, that the earlier grant of First War Powers Act relief, presumably granted to the full by conscientious administrators, was not to preclude the grant of "further relief" under the Lucas Act.

Finally, the Government urges,

"the new Act's phrases 'equitable claims' and 'fair and equitable settlement of claims' are shorthand expressions directly referring to the unfair discrimination among certain contractors, following the ending of hostilities, which Congress desired to redress, as well as to the facts that War Powers Act relief was not demandable as of right and involved considerations of fair and honorable dealing." *Ibid.*

To the extent that this argument rehashes the legislative history argument, it requires no further discussion. But the Government's speculation as to the origin of the terms "equitable claims" and "fair and equitable settlement of claims" conflicts so sharply with that history as to merit comment. We have shown that the initial phrase "to prevent a manifest injustice" was at once perceived to be broader than the First War Powers phrase "facilitate the prosecution of the war." Main Brief, 8. And Senator McCarran stated that the contractors who had been denied relief because of the administrators' illiberal interpretations (Main Brief, note 5), were

"entitled to equitable relief, *fair relief*"

because

"the Government wants to * * * *deal fairly* with those who aided the Government in its great struggle." Hearings, 66.

Thus, equitable claims were equated with fair claims, claims which had theretofore been denied, and which would again be denied if the "equity" dispensed by the administrators under the First War Powers Act were to be made the criterion. The principle of "equity" did not, as the Government suggests, replace

"the notion of 'manifest injustice', which appeared in the bill as introduced * * * because of the feeling that the latter term was too vague and indefinite." U. S. Brief, note 23.

To the contrary, Senator Revereomb and the General Accounting Office representative agreed that "manifest injustice" would afford relief for a

"claim based upon actual loss without the fault of the contractor," Hearings, 27,

and the shift from "manifest injustice" was made because

"these words * * * are almost identical in their meaning with the words 'upon a fair and equitable basis' * * *." Hearings, 81.

The attempt of the Government to equate First War Powers Act relief with Lucas Act relief fails first, because the Lucas Act was elaborately drafted in entirely different terms in preference to a mere temporal extension of its predecessor, and second, because the Lucas Act sought to deal "fairly" with contractors who had suffered losses in helping the war effort, while the First War Powers Act granted relief solely to facilitate the prosecution of the war, losses alone affording no basis for relief thereunder.

II.

REQUEST FOR RELIEF.

The Government's argument on this score in large part restates its contention that Lucas Act relief is no broader than the relief earlier afforded under the War Powers Act. Since Congress did in fact design broader relief, insistence on "filing" requirements which claimants could not have possibly divined—because the Lucas Act authorized relief only as to requests filed prior to its enactment⁶—would abort the intended relief. Congress did not at once grant relief and make relief impossible by insisting on impossible formalities.

The Government builds on shifting sands when it urges that the phrase "request for relief" was

"adopted from administrative usage under the First War Powers Act . . ." U. S. Brief, 45.

For the phrase "request for relief" is not mentioned in either that Act, or Executive Order 9001 issued thereunder. Nor is there the slightest evidence that Congress was advised during consideration of the Lucas Act that the phrase "request for relief" had any peculiar significance. It was not even defined in Executive Order 9786 issued under the Lucas Act. Only now does the Government seek to graft an obscure administrative usage, if indeed there was such a usage, upon the Lucas Act. Such an argument is rejected under the "re-enactment rule,"⁷ and has no more merit

⁶ §3 limits relief to losses with respect to which written requests for relief were filed on or before August 14, 1945. The Lucas Act became effective August 7, 1946.

⁷ "The doctrine of statutory incorporation of a prior administrative ruling by reenactment without change is founded upon the belief, however fictitious, that the *members of Congress had some knowledge of the prior ruling.*" *Commissioner of Internal Revenue v. Sun Pipe Line Co.*, 126 F. (2d) 888, 892 (C. A. 3d, 1942).

The Government adduced no proof that Congress had any knowledge of any unusual usage of the phrase "request for relief," or

when a statute is first enacted. A contrary rule would enable administrators to amend legislation by later pulling inconspicuous administrative practices out of the drawer. And the use by various departmental spokesmen at the hearings of differing terms to characterize applications for adjustment plainly shows that the phrase was not a term of art even among those administering the War Powers Act.⁸

Against this background, we turn to the "authoritative expositions" which the Government states it would be "self-imposed blindness" to ignore. U. S. Brief, 39. These "expositions" are publications in a case book and a legal periodical, one of which is by a former counsel to a branch of the Army Service Forces. U. S. Brief, notes 8 and 9. The publications were not of course called to the attention of Congress, and are therefore not "revealing [of] the legislative purpose." *Id.* at 39-40. Moreover, the Armed Services were so thoroughly discredited in the course of the Hearings as to lack any "authority" whatsoever. Main Brief, notes 5, 12. Reliance is likewise placed on Executive Order 9786 issued under the Lucas Act. U. S. Brief, 40, 33. The Order entirely omitted to define "request for relief"—that was an unhappy administrative afterthought.

that the usage was so notorious that Congress may be presumed to have possessed that knowledge. Cf. *Iselin v. United States*, 270 U. S. 245, 251 (1926). And this Court has reversed a judicial interpretation which antedated the reenactment of a statute where "Congress may not have had its attention directed to an undesirable decision." *Helvering v. Hallock*, 309 U. S. 106, 120 (1940).

⁸ Thus the Secretary of War referred to "the petition for relief," Hearings, 6, which seemed to be the phrase generally used by Army officers, *Id.* at 18; see also *Id.* at 16. General Corbin, Quartermaster General, preferred "application for relief," *Id.* at 33. The Navy used the terms "request for modifications, amendment, or settlement," *Id.* at 68, and "applications for amendments or modifications," *Id.* at 74-75. A contractor testifying before the Senate Committee spoke of "applications for relief," *Id.* at 25. The representative of the General Accounting Office used the phrase "claims for losses," *Id.* at 29; and Chairman McCarran spoke of an "application for correction of *** losses," *Id.* at 48.

Plainly, therefore, the "request for relief" phrase was not "adopted from administrative usage under the First War Powers Act," U. S. Brief, 45, nor from "authoritative expositions" of the purpose of the Congress. Instead, the Congress, as Senator Lucas simply stated, was thinking

"primarily about where contractors are applying for relief *in one form or another.*" Hearings, 20.

The "request for relief" was the artless reflection of the Congressional desire to rescue unfortunate contractors from their losses, not to hamstring the relief so plainly designed. Read naturally in light of the beneficent purpose of the Act, "request for relief" includes any writing seasonably filed which showed on its face that losses had been incurred and that the contractor was seeking to be made whole, whether by a claim for extra compensation, or for adjustment, or the like.

The Government challenges the sufficiency of an invoice which "makes no mention of losses." U. S. Brief, 42. Such an invoice would not, of course, normally anticipate denial. Moreover, in most cases it was futile to seek relief from denial of losses which the Government by illiberal interpretations had disabled itself from giving. The Government also rejects invoices on the ground that they

"cannot well fit into the category of 'losses' until they are finally acted upon, since no loss can exist until the claim is denied in whole or in part." U. S. Brief, 45.

The argument proves too much. Since the test of a proper request for relief is its status as of August 14, 1945 (§ 3), it would follow that failure prior thereto to deny even a plainly labelled request for relief from losses would preclude submitting a claim for losses under the Lucas Act. This would have discriminated against claims pending on August 14, 1945, in favor of claims denied prior thereto. If the answer be that there is still time to establish a loss by denial, there is no bar to showing the loss by administrative denial of an invoice claim.

Let us emerge from such foggy speculations into the sunlight of reality. It was the existence of losses that was made controlling, not the piece of paper from which such losses were to be discerned. Section 3 of the Lucas Act does not so much as mention a "request for relief *from losses.*" It merely limits relief to losses.

"*with respect to which* a written request for relief was filed * * *."

If there were losses, the invoice filed "with respect" thereto is a sufficient request for relief. If an invoice discloses increased costs due to Governmental changes of specifications, to unavoidable delays and the like and that the cost of performance exceeds the contract costs; in a word, if computation on the face of the instrument indicates that losses were incurred, that writing, we submit, constitutes a sufficient request for relief. It was for this reason that in *Modern Engineering Co. v. United States*, 113 C. Cls. 272, 83 F. Supp. 346 (1949), the Court upheld invoices

"claiming reimbursement for additional expense in connection with certain purchase orders, and which, on their face, show that plaintiff incurred losses."

By the same token, if the Government appropriates property so as to prevent performance under a contract, loss may be sustained in the execution of that contract without the fault or negligence of the contractor. To deny that claims for such losses are "requests for relief" is to revert to medieval niceties of pleading.

The folly of such niceties is revealed by the Government's attack upon the request for relief in *Howard Industries, Inc. v. United States*, 113 C. Cls. 231, 83 F. Supp. 337 (1949). U. S. Brief, 46-48. The loss there suffered was detailed in a letter which asked for a "redetermination of price," showed a "net deficit" and requested "as an adjustment of Contract Price" the payment of that deficit. When one suffers a deficit in performing a contract he

suffers a loss, and a request for adjustment of that deficit is a request for relief. There is not the faintest suggestion that the Government was misled or was not cognizant of the fact that additional relief was sought by the claim for just compensation in the *Fogarty* case, by the invoices in *Modern Engineering Co. v. United States, supra*, or the correspondence in the *Howard Industries* case. As the Court of Claims put it, the "request for relief" proviso merely means that applicants must have "given those agencies an opportunity to either grant or deny their claims."⁹ No contention can be made that such opportunity was not afforded in these cases.

The Government's insistence upon form strikes a strange discord in an era which subordinates refinements of pleading to the attainment of substantive justice. *Maty v. Grasselli Chemical Co.*, 303 U. S. 197, 200-201 (1938). No more should be demanded of businessmen than of trained advocates. The Government's rejection of claims on these grounds stands condemned by the President himself as "technical."¹⁰ We cannot attribute to Congress, on the one hand, an intention to grant far-reaching relief from losses, a fact evidenced by the face of the statute and driven home by the legislative history, and on the other hand an intention to render the statute impotent by insistence that claimants must prophetically have employed prior to August, 1945, the talismanic words first employed in the Lucas

⁹ *Howard Industries, Inc. v. United States*, 83 F. Supp. at 337. See *Spicer v. United States*, 113 C. Cls. 267, 83 F. Supp. 345 (1949).

¹⁰ In the veto message on H. R. 3436 the President said he would approve of a provision that would

"2. Remove the basis for *technical rejection* by permitting either a request in writing for relief under the First War Powers Act, or a written demand for a payment of losses, or a written notice of sustained or impending loss, if timely filed, to be accepted as a basis for claim." H. R. Doc. No. 629, 81st Cong., 2d Sess., 4 (1950).

These "'technical'" grounds for rejection were first superimposed upon the unambiguous language of the statute by the President's subordinates.

Act in August, 1946. This is patently to frustrate the intention of Congress. Little wonder that Congress has since bitingly rebuked the administrators for such a construction. See *infra*, pp. 22-24; Main Brief, 23-28.

III.

A PRIOR SETTLEMENT IS NOT A BAR.

It is too plain for argument that the statutory provision

“a previous settlement *** shall not operate to preclude further relief”

is nullified by the Executive Order direction that

“no claim shall be considered if final action with respect thereto was taken”

prior to August 14, 1945.

The natural deductions from the face of the statute are fortified by the legislative history. Initially there had been a proviso that the relief granted

“shall not be applicable to cases *** which have been finally disposed of”, Hearing, 1,

and the War Department sought to preserve the “finality” of “final settlements.” Hearings, 6. But the original proviso was replaced by the present § 3 because Congress was told the settlement bar would exclude many cases which had been “decided adversely to the contractors,” Hearings, 29, under the erroneous administrative interpretation.¹¹ The mere elision of the earlier “finality” provision, let alone the substitution of language expressly removing the bar of a prior settlement, would preclude administrative re-interpolation of the deleted section. *Border Pipe Line Co. v. Federal Power Commission*, 171 F. (2d) 149, 152 (App. D. C., 1948).

¹¹ The “reasons” for removing the settlement bar, cf. U. S. Brief, 65, are set forth in our Main Brief, 17-18.

These are simple, familiar propositions. To answer them the Government piles inference on inference for 28 pages of painfully involved argument.¹²

First, the Government argues that the administrators are to act

"in accordance with regulations to be prescribed by the President," U. S. Brief, 50

and attaches "capital significance" to the fact that "it was the President who issued the regulation." U. S. Brief, 73. Regulations must "carry out the purposes of the Act—not *** amend it." *Miller v. United States*, 294 U. S. 435, 440 (1935). And see *Neuberger v. Commissioner of Internal Revenue*, 311 U. S. 83, 89 (1940). And the President can no more amend a statute by regulation than the lowliest administrator. Cf. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 420-433 (1935). The Government is not aided by *Hamilton v. Dillin*, 21 Wall. 73 (1875), U. S. Brief, 74, because there the statute authorized the President to act "in his discretion." By the same token, the administrators' "contemporaneous construction," U. S. Brief, 53,

"must yield to the positive language of the statute." *Houghton v. Payne*, 194 U. S. 88, 100 (1904).¹³

Second, the Government seeks to establish an "intimate connection with First War Powers Act ~~discretionary~~ relief," U. S. Brief, 11, a "breadth of discretion" in issuing regulations" because of the subject matter, i.e., "gratuity legislation." *Id.* at 54.

¹² This process of "interpretation" was the very thing the Committee Chairman sought to avoid:

"will the War Department have to interpret that bill, or shall we make it so plain that it will lay the road wide open for the War Department to render justice in a given case?" Hearings, 50.

¹³ The Government itself recognizes that a contemporaneous construction may be "overturned" if a "different construction is plainly required." U. S. Brief, 53. A construction which nullifies an express statutory provision "plainly requires" to be overturned.

a) Now the cat is out of the bag: the administrators unabashedly are seeking to recapture the discretion they once had and which the Lucas Act withdrew. The War Powers Act had lodged discretion in the President, authorizing him to grant relief

"whenever *he deems* such action would facilitate the prosecution of the war."

The original draft of the Lucas Act had also authorized relief

"*whenever the head of such department or agency makes a determination* that such action is necessary to prevent a manifest injustice * * *." Hearings, 1.¹⁴

But the dissatisfaction of the Senate Committee with the administrators' technical denials of relief, Main Brief, note 5, led it to cast the Act in completely non-discretionary terms. Hence, the Lucas Act authorized administrators to

"settle equitable claims of contractors¹⁵ * * * for losses incurred * * * without fault or negligence on their part,"

not those which *they deemed* should be settled. And to put the matter beyond peradventure, § 6 provided for a judicial trial *de novo*:

"any claimant * * * dissatisfied with the action * * * of the Government in either granting or denying his claim, * * * shall have the right * * * to file a petition with any Federal district court * * * asking a *determination by the court of the equities involved* in such claims * * *."

¹⁴ The original bill was criticized by the representative of the General Accounting Office because cessation of the war made it no longer

"necessary to delegate all of this authority * * * to the President." Hearings, 26.

¹⁵ The governing criteria were enumerated in § 2.

It further provided that

"the court * * * shall have jurisdiction to determine the amount, if any, to which such claimant * * * may be equitably entitled * * * and to enter an order directing such department or agency to settle the claim in accordance with the finding of the court * * *."¹⁶

Thus the door was shut and bolted against administrative discretion.

b) Administrators are given no license to gut a statute because the subject matter is "gratuity legislation." Only last term this Court reminded the Government:

"The power of the purse belongs to Congress, and Congress has determined that the price for greater fairness is not too high." *Wong Yang Sung v. McGrath*, 94 L. Ed. 383, 391 (1950).

The Government's citations to *Hamilton v. Dillin*, 21 Wall. 73, 88 (1875) and *Work v. Rives*, 267 U. S. 175 (1925), are of no avail. The *Rives* case involved a statute directing that

"no claims shall be paid unless it shall appear to the satisfaction of said Secretary * * *." *Id.* at 179,

that certain conditions obtain. In the *Dillin* case, the statute likewise provided that

"the President may, in his *discretion*, license and permit commercial intercourse."

Such discretion was with good reason eliminated from the Lucas Act.

¹⁶ Compare the statute in *Work v. Rives*, 267 U. S. 175 (1925), which made payment dependent upon

"the satisfaction of said Secretary." *Id.* at 179, and where the Court noted that

"it did not * * * make the losses recoverable in a court, but expressly provided otherwise." *Id.* at 181-182.

c) This pointed removal of the prior discretion likewise deflates the Government's reliance on the *title* of the Lucas Act:

"To Authorize Relief in certain cases * * *."

The "certain" cases are described in the body of the statute, and the title confers no power on the President to pick and choose amongst them,¹⁷ and certainly not to negate the provision that a prior settlement shall be no bar to "further relief."

d) Still another claim to discretion is rested on the argument that

"Section 2(a) provides that the amount of a contractor's net loss on all his contracts * * * should constitute an upper limit on the relief—not, it should be emphasized, an amount required to be granted." U. S. Brief, 51.

In directing that administrators

"shall not allow any amount *in excess* of the amount of the net losses,"

and that they should consider, i.e. deduct, "relief [already] granted," § 2(a), manifestly did not authorize them to afford only such relief as they pleased, in total disregard of net losses suffered. Cf. *supra*, p. 8. Moreover, by § 6, the Courts too are authorized *de novo* to "determine the amount * * * to which the claimant may be equitably entitled," and there is not the slightest reason to believe that the administrators were given power to curtail the judicial jurisdiction.

Finally, assuming the non-existent "discretion" and stretching it to the furthest reach, it still does not extend

¹⁷ "the title of an act cannot overcome the meaning of plain and unambiguous words in its body." *Caminetti v. United States*, 242 U. S. 470, 490 (1917) and cases cited.

to nullification of an express statutory mandate that "further relief" be granted despite a prior settlement.

Third, the Government contends that it was necessary to define terms such as "fair and equitable settlement," U. S. Brief, 31-52, and that the intention of Congress in § 3 is to be derived from a study of the entire context of the statute and its purposes. *Id.* at 65. No study of the context can justify reading "white" as "black", all the less since the Congress plainly expressed its intention to remove the bar of prior settlements. Nor can the President under the guise of defining the § 2 "fair and equitable settlement" or "confining the Act to 'equitable claims'", *Id.* at 58, read out of the statute the § 3 mandate that a prior settlement shall not be a bar to "further relief."

Fourth, the Government raises the spectre of "potentially enormous" liability, U. S. Brief, 66, of "an administrative burden of potentially impossible proportions." *Id.* at 62. Senator McCarran stated that

"There are about 290 claimants under the Lucas Act,"
96 Cong. Rec. (unbound) 14,871,

and the Government stated in its Memorandum on Certiorari, pp. 1-2, that the amount involved in the 90 pending court cases was \$17,000,000. Presumably the larger claims are in court; at worst, the remaining 200 claimants are unlikely to exceed triple the \$17,000,000 figure. Were it more, Congress insists that they be paid, and to it "belongs the power of the purse." *Wong Yang Sung v. McGrath*, 94 L. Ed. 383, 391 (1950).¹⁸

Fifth, the Government urges that the President justifiably believed the Act to be a mere temporal extension of the First War Powers Act, and had "no reason to believe" that Congress intended to reopen the cases which had been settled. U. S. Brief, 57-58. The terms of § 3 furnished

¹⁸ The Government's references to "insurance," to a "guarantee [of] all war contractors against loss," U. S. Brief, 24, 10, 58, overlook the prospective nature of guarantees and insurance. Congress has merely come to the rescue of 290 contractors, as it may.

him a glaring reason. They should, indeed, have led him to revise his erroneous conception of the Lucas Act's scope. For § 3 was cast in terms of "further relief," after relief had been granted under the predecessor acts. Main Brief, 6.

Sixth, and last, the Government seeks to save some meaning for § 3 by confining it to cases where "some," i.e. partial relief had been granted, U. S. Brief, 59-60, and it argues that § 3 does not refer to a previous settlement under the First War Powers Act "of the same request now relied upon." U. S. Brief, 61. There is no basis whatsoever in the Hearings for changing the Congressional language to read "a previous *partial* settlement." To the contrary, the legislative history shows a pre-occupation with cases "decided adversely to the contractors," i.e., cases "settled under the First War Powers Act" which "could not be reopened now." Hearings, 16; Main Brief, 16-18. Congress abandoned the initial bar of cases "finally [not partially] disposed of", Hearings, 1, and, by § 2(e), it unqualifiedly directed the administrators to take account of prior *relief granted*, not "*partial* relief granted." In short, Congress contemplated that all settlements, comprehensive as well as partial, were not to preclude further relief. To exclude complete settlements is unjustifiably to rewrite the statute. On what ground, indeed, was Congress to discriminate in favor of one whose claim had been partially settled, against one whose claim had been completely yet unjustly settled? Certainly, not because of the "impossible" burden assigned by the Government, which, we have shown, is chimerical.

IV.

CONGRESS HAS A SECOND TIME REPUDIATED THE ADMINISTRATORS' POSITION.

The Government blithely dismisses the blistering Congressional statements which accompanied the first and second attempts of Congress to blast the erroneous administrative interpretation out of the road because they

"are irreconcilable with the descriptions of the Lucas Act by the Congress which passed it." U. S. Brief, 72.

The Hearings of the Lucas Act demonstrate that it is the administrators, not the Congress, who seek to put a new gloss on the Act.

We turn to Senator McCarran's¹⁹ detailed comment on the second veto because, as he stated,

"The Congress wrote this legislation, and the Congress should be presumed to know something about what was intended." 96 Cong. Rec. (unbound) 14,870.

1) The Broader Scope of the Lucas Act.

On this issue Chairman McCarran stated:

"It was the intent of the Congress, in passing the Lucas Act, to offer relief beyond that afforded by the First-War Powers Act. The administrative interpretation and the executive order have prevented the full effectuation of that intent." *Id.* at 14,868.

¹⁹ Senator McCarran described himself as

"one who participated in the drafting of the original Lucas Act, who was Chairman of the Committee on the Judiciary at the time the act was approved by the Committee, who handled the act on the floor of the Senate, and who has followed it closely ever since." 96 Cong. Rec. (unbound) 14,866.

The Government's citation of *United States v. United Mine Workers*, 330 U. S. 258, 281-282 (1948), U. S. Brief, 72, for the suggestion that opinions expressed in a later Congress are without bearing is therefore beside the point. In that case, Senators were debating the War Labor Disputes Act 11 years after enactment of the Norris-La Guardia Act and their expressions were rejected as guides to constructions of the latter Act because

"They were expressed by Senators, some of whom were not members of the Senate in 1932, and none of whom was on the Senate Judiciary Committee which reported the bill." 330 U. S. at 281-282.

In the present case, moreover, the subsequent Congress and both of its Judiciary Committees were clarifying the Lucas Act, and they took exactly the view expressed by Senator McCarran. See also the 1947 Congressional comment, one year after the Lucas Act, U. S. Brief, 67, which the Government dismisses because it professes to know better than the Congress what the Congress meant.

And, he repeated,

"the Lucas Act, by its plain language, was intended to grant relief beyond that afforded by the First War Powers Act; and the President's Executive Order contravened the statute in this regard." *Id.* at 14,870.

2) The Request for Relief.

The President labelled as a "departure" from the intent of the Lucas Act, the

"definition of a request for relief *** which greatly relaxes the existing requirements that claims be founded upon a specific application for the extraordinary relief which was allowable under the First War Powers Act ***." *Id.* at 13,143.

To this, Chairman McCarran properly replied:

"This is an erroneous statement. It speaks of an 'existing requirement' which does not exist. The Lucas Act contains no such requirement. The Lucas Act contains only two requirements with regard to the request for relief, namely, that it must have been in writing, and must have been filed on or before August 14, 1945." *Id.* at 14,870.

3) The Settlement Provision.

The second veto message stated that the second bill, S. 3906,

"would not preclude the reopening of an indeterminate number of cases that had been settled ***." *Id.* at 13,143.

But, as Chairman McCarran stated:

"The Lucas Act, as it now stands on the statute books *** specifically provides that a 'previous settlement under the First War Powers Act shall not operate to preclude further relief otherwise allowable under this act.'" *Id.* at 14,870.

And the Executive Order provision to the contrary, said he,

"has attempted to contradict that plain language of the law." *Ibid.*; see also *id.* at 14,865.²⁰

In sum, said Senator McCarran, the "regulations severely restricted the act, and in some respects were directly contrary to the plain language of the act." *Id.* at 14,870

and the President and administrators

"have denied the Lucas Act effect." *Id.* at 14,869.

It is astonishing to find the administrators now claiming a greater power to divine the intention of Congress than Congress itself.

More important because of its disturbing constitutional implications is the Government's statement that the recent Congressional construction of its own Act is "effectively neutralized" by the President's veto statement

"that he construed the Lucas Act, *at the time he gave it his approval*, very differently from the way in which the sponsors of the amendatory bills now say that they interpreted it * * *." U. S. Brief, 73.

The Government, in fact, would have it that the

"President is more 'Chief Legislator' than 'Chief Executive.'" U. S. Brief, 75.

It offers Professor Corwin²¹ as one of its two witnesses. *Ibid.* But Corwin has rejected even a Presidential statement made *at the time of signing*²² an enactment:

"an act of Congress gets its intention from the houses, in which the constitution specifically vests [not some

²⁰ The "real basis of the President's complaint is the failure of this bill to change the Lucas Act in the way the President thinks it should be changed." *Id.* at 14,869.

²¹ Corwin, *The President: Office and Powers*, e. VII (3d ed., 1948).

²² No such statement was made at the time of signing the Lucas Act.

but] 'all the legislative powers herein granted.' For a court to vary an interpretation of an act of Congress in deference to something said by the President at the time of signing it would be to attribute to the latter the *power to foist upon the houses intentions they never entertained* and thereby endow him with a legislative power not shared by Congress." Corwin, *The President: Office and Powers*, 344 (3d ed. 1948).

If expressions of presidential understanding are irrelevant when the statute is signed, *a fortiori*, his later assertions, when he vetoes bills designed to reaffirm the original Congressional intent, as to how he construed the Act at the time of signing are of no significance.

To evade the impact of the subsequent legislative history, the Government observes that the Senate, which had twice approved clarifying bills, failed to override the President's second veto.²³ U. S. Brief, 69, 72. The Government has itself noted that "the President's veto is normally effective in nine cases out of ten." *Id.* at 76.²⁴ But it failed to realize that when a bill is passed over the President's veto,

"the reason usually lies in the pressure of organized opinion outside so strong that the Congress is not willing to take the risk of leaving the presidential veto as final." Laški, *The American Presidency*, 148-149 (1940).

²³ The Government also attempts to differentiate the "later" Congress which passed the clarifying bills from the Congress which adopted the Lucas Act. But the later Congress included the author of the Lucas Act, the Chairman of the Senate Committee which redrafted the Act who vigorously denounced the executive construction, and the Chairman of the House Subcommittee, Francis E. Walter, who approved the Lucas Act, and whose Committee later condemned the Government's "erroneous interpretation." Main Brief, 23. The Government's elaborate efforts to depreciate the import of the subsequent legislative history is in itself the most eloquent testimony of its significance.

²⁴ As of 1947 only 55 of 771 vetoes had been overturned: "It must be concluded that this record establishes the practical absolutivity of the veto." Patterson, *Presidential Government in the United States*, 53-54 (1947).

The Lucas Act amendment vetoes were not overridden because there was no risk in ignoring the 290 claimants, *supra*, p. 20, who could exert no appreciable pressure.²⁵ In consequence, the failure to override the Presidential veto can scarcely be said to "neutralize" the vigorous Congressional condemnation of the restrictive administrative interpretation.

This case discloses an unflagging, last-ditch administrative campaign to defeat the Congressional will. Finding their pleas to the Congress during the Lucas Act Hearings for restrictive legislation (Main Brief, note 10, p. 15) rejected, the administrators renewed the battle by drafting an Executive Order which nullified the Act. And we make so bold as to state that they drafted the veto messages which frustrated Congress' subsequent attempts to call a halt to their nullification of the Act.

Senator McCarran justly stated that the second veto was tantamount to the position

"that the Congress may not, by subsequent enactment, correct what it considers to be executive or administrative misinterpretation of a previous act of Congress."

96 Cong. Rec. (unbound) 14,869.

It is this fact which renders the present controversy so important. Without the frustration of the successive Congressional attempts to rescue the Lucas Act from its administrators, this case would merely represent another exercise in statutory construction. Vindication of popular rule therefore demands that this Court carefully scrutinize the Lucas Act and its legislative history so that the admin-

²⁵ And there is the natural reluctance of the party in power to engage in an unseemly squabble with its party chief once his views have been manifested. Cf. 31 American Political Science Review 54-56 (1937).

istrators may be restored to the subordinate position which they occupy under our system of government.

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